



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-000880

First-tier Tribunal No:
DA/00260/2020

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 12 June 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LORENZO NATHANIEL D'AMICO
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr N Wain, Home Office Presenting Officer

For the Respondent: Mr D'Amico appeared in person

Heard at Field House on Thursday 25 May 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge S J Clarke ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 10 August 2020 making a deportation order against him pursuant to regulations 23 and 27 of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The Appellant is a national of Italy born in 1997. He came to the UK in October 2004 and has remained here since. The Respondent challenged the length and continuity of the Appellant's residence but has not taken issue with Judge Clarke's finding that the Appellant has been in the UK since that date. The Appellant has a string of criminal convictions dating back to 2015. The index offence was one of destroying or damaging property, assault occasioning actual bodily harm and breach of suspended sentence. He was sentenced to a term of twenty-two months in prison.
3. The Judge found that the Appellant had acquired the highest level of protection against deportation (imperative grounds). Whilst she accepted the Appellant's "history of violence" ([23] of the Decision), she concluded that the requisite threshold for deportation was not met.
4. The Respondent appeals on one ground, namely that the Judge failed to have regard to relevant case-law and failed to consider the factors set out in schedule 1 to the EEA Regulations ("Schedule 1").
5. Permission to appeal was granted by First-tier Tribunal Judge Curtis on 14 March 2023 in the following terms so far as relevant:
 - “..3. Whilst it is not an arguable error of law for the Judge to have not expressly referred to reg. 27(8), there is a requirement to consider those matters. As contended in the grounds, it seems to me it is arguable that the Judge did not consider the matters in sch. 1. The Judge in [25] that the Appellant has integrated 'into UK society since 2004' but does not consider how the integration otherwise borne through that period of residence would be affected by para. 4 of sch.1. Nor does the Judge appear to have engaged with the effect of para. 3 on the fact that the Appellant has persistently committed offences since 2015. Nor with the mandatory considerations in reg. 27(6).
 4. In short, it is at least arguable that the Judge failed to give adequate reasons, in light of the mandatory considerations in reg 27(6) and in sch.1 of the 2016 Regulations, for the ultimate conclusion that the Appellant's removal could not be justified.”
6. The matter comes before me to decide whether the Decision contains an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.
7. I had before me a core bundle of documents relating to the appeal, the Appellant's bundle and Respondent's bundle before the First-tier Tribunal together with the Appellant's skeleton argument before the First-tier Tribunal. In light of the arguments put forward at the hearing I do not need to refer to the documents other than the Decision.

8. Having heard submissions from Mr Wain and having heard briefly from Mr D'Amico, I indicated that I would reserve my decision and provide that with reasons in writing. I now turn to do that.

DISCUSSION

9. The Respondent appeals on one ground. She submits that the Judge has misdirected herself by failing to consider whether the Appellant's imprisonment has broken integration having regard to his continuing offending. It is also asserted that the Judge has failed to consider the Appellant's propensity to reoffend and the seriousness of such offences. Finally, it is submitted that the Judge has failed to have regard to Schedule 1, particularly having regard to the need to consider whether the Appellant constitutes a genuine, present and sufficiently serious threat, the public interests at play and the proportionality of deportation.
10. At the outset of the hearing, I raised with Mr Wain a potential issue in relation to the Judge's self-direction as to the level of protection which the Appellant enjoys which is not expressly raised in the Respondent's grounds.
11. At [18] of the Decision, the Judge says this:

“The Appellant has shown that he acquired PRR [permanent right of residence] on 31 December 2009, and to benefit from the highest protection of 10 years, he needs to show counting backwards from the date of his imprisonment that he has resided in the UK continuously for over 10 years, and I find that when looking at the evidence, including committing 16 offences from 2015 before the index offence, as well as the birth of his child in 2013, there is evidence with varying degrees of reliability. I find the documentation issued by independent sources is the most cogent, it is more likely than not that the Appellant has lived continuously in the UK since his arrival in 2004 counting backwards from the date of the hearing and the Appellant's level of integration into UK society and the degree to which the offending behaviour has not displaced genuine integration.”

[my emphasis]
12. I have emphasised two sentences in this passage. Neither in fact takes the correct date in relation to calculation of the highest level of protection. That is to be calculated from the date of the Respondent's deportation decision. The first of the sentences which I have highlighted is problematic read alone as it suggests that the date is to be calculated back from the date of imprisonment which is incorrect as a matter of law. I accept however that it is relevant that the Appellant had lived in the UK for over ten years by the time of his first custodial sentence.
13. Mr Wain acknowledged that this first sentence was incorrect but drew my attention to the second of the sentences which I have highlighted. Whilst, once again, the date from which the period is to be calculated is incorrectly stated as date of hearing, as he pointed out, the Judge has

there considered whether the Appellant's imprisonment (perhaps wrongly stated as "offending behaviour") had broken integration.

14. I invited Mr Wain to consider whether the Respondent wished to amend her grounds expressly to challenge this element of the Decision. He confirmed that, reading that paragraph as a whole, the Respondent did not wish to challenge this as a misdirection. The Judge had in substance applied the test which she should have applied. As noted above, the Judge has expressly considered whether the Appellant's offending has broken integration and has found that it has not.
15. There is therefore no challenge to the Judge's finding that the Appellant benefits from the highest level of protection against deportation that is to say that the Respondent must show that there are imperative grounds to deport the Appellant.
16. The tests which the Respondent says that the Judge has failed to apply are to be found in Schedule 1, in particular at paragraphs (3), and (7). Paragraph 27(8) of the EEA Regulations requires the Tribunal to have regard to those matters which are as follows:

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

...

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

...

(b) maintaining public order;

(c) preventing social harm;

...

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

...

(j) protecting the public;

..."

17. The permission grant also draws attention to the matters in paragraph 27(6) of the EEA Regulations as follows:

"(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."

18. Building on that latter issue, Mr Wain also submitted that the Judge had failed to consider the Appellant's ability to rehabilitate. He drew my attention to the case of Secretary of State for the Home Department v Dumliauskas and others [2015] EWCA Civ 145 ("Dumliauskas") and in particular [17] of the judgment as follows:

"17. The Upper Tribunal held that the relative prospects of rehabilitation in the UK and in Lithuania were a factor relevant to the assessment of proportionality; accordingly the First-tier Tribunal had not erred in taking it into account. The Upper Tribunal summarised its conclusion in paragraph 31 of its determination:

31. The negative impact of removal on rehabilitation will of course not always be a decisive factor. We accept that the impact will be greater in the case of integrated EU citizen but we do not accept that it is a factor not to be taken into account when dealing with a person such as the appellant who has been in this country for a number of years and has only limited ties with his country of origin as the panel found. While the Court of Appeal in *Essa* noted that the ECJ had not adopted the suggestion in the advocate general's opinion that a decision maker should state precisely in what way the decision did not prejudice the offender's rehabilitation no doubt the panel would have been assisted by some material on the matter. We are not satisfied that the panel materially misdirected itself in commenting on the absence of material. It may be that not every panel would have reached the same decision as we have said did have the benefit of hearing from the appellant and assessing the evidence with very great care. The panel did not reach this decision lightly. In the circumstances of this case we are not persuaded it materially misdirected itself. As it noted in paragraph 134 of its decision this is very likely to be the final opportunity of the appellant to demonstrate that he can take the advantage of the opportunity he has been offered."

19. The Respondent also in her pleaded grounds asserts that the finding that the Appellant does not pose a risk to the public is "bordering on the perverse", particularly in light of the inadequate reasons for the finding.
20. Finally, Mr Wain drew attention to what he said was an inconsistency between what is said at [24] of the Decision and [21] of the Decision particularly in light of the most recent arrest of the Appellant in January 2023.
21. Dealing with that last point first, at [24] of the Decision the Judge says this:

“The Appellant told me that he has very recently undergone a change by attending AA meetings, now seeing his GP for assistance both mentally and physically, and he is being referred to a psychiatrist the Appellant believes, and he is changing his behaviour because he wishes to resume contact with his son now that the mother has ceased it upon being so advised it would appear by social services.”

22. At [21] of the Decision, the Judge records the following:

“The PNC shows an arrest on 9 December 2021, police bail until 21 January 2022 with release on police bail and conditions attached, but as I pointed out if the bail is not thereafter from the Magistrates’ court it suggests that the offence was not prosecuted, and the Appellant is not still subject to those conditions or bail. There is a recent arrest on 4 January 2023 for another domestic assault. I note these arrests, and I will approach this case on the basis that any prosecution case against the Appellant succeeds so that the Respondent’s case is taken at its highest, but without wishing in any way to comment upon the facts of these more recent arrests in any way.”

23. Mr D’Amico informed me that the arrest in January 2023 had not led to any prosecution as it was a case of self-defence. That cannot however impact on whether the Judge made any error of law as the Judge proceeded on the basis that the arrest would lead to a successful prosecution. However, I am unpersuaded that there is any inconsistency in the Judge’s findings. The Judge at [21] of the Decision was simply recording the facts of the offending whereas at [24] of the Decision she was addressing herself to the Appellant’s evidence about the steps which he was taking to address his behaviour. It was not said that his rehabilitation was complete.

24. That then brings me on to the point about rehabilitation as the Judge was at [24] considering the prospects of the Appellant’s rehabilitation in the UK. It cannot be said that she did not consider this. This is underlined by what is said at [25] of the Decision as follows:

“I record what he has said, but I will approach the case on his conduct since 2015 until the last week or so since he has contacted his GP and started to attend AA. But even ignoring what the Appellant told me about his current change and attempt at rehabilitating himself, and viewing the case as an unreformed violent abuser of women in a domestic setting, I find that despite this bad history of violence, which must be considered when considering his integration into UK society since 2004, and the crimes and behaviour of the Appellant are not to date sufficient to justify the expulsion of the Appellant because he does not today pose ‘an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who (in the language of the Preamble to the Directive) has become ‘integrated’ by ‘many years’ residence in the host state’”.

25. I accept that the Judge does not deal with the prospects of the Appellant’s reintegration in Italy. However, that failure does not amount to a material error. As was pointed out in Dumliauskas, consideration of

the relative prospects of rehabilitation is part of an assessment of proportionality. Here, the Judge did not get that far because she concluded that the Appellant did not pose a sufficiently serious threat to justify his deportation. In any event, having found that the Appellant is genuinely integrated in the UK, such that imperative grounds are required to deport him, it cannot be suggested that, had she considered whether deportation would have an impact on the prospect of rehabilitation, she would have reached a conclusion which would benefit the Respondent.

26. That then brings me on to whether the Judge properly evaluated the threat posed by the Appellant. As is evident from what is said at [25] of the Decision, the Judge accepted that the Appellant does continue to pose a risk. Her reasoning which led to the allowing of the appeal was that the threat level was insufficient to justify deportation where the Appellant benefits from the highest level of protection.
27. The Judge's reasoning in that regard is to be found at [22] of the Decision as follows:

"Having identified the Appellant falls within the highest level of protection under Regulation 27(4) the Respondent bears the burden of justifying the proportionality of the expulsion, that is the proposed interference with the individual's treaty rights, as proportionate, when gauged against the imperative threshold standard, I was referred to paragraph 17 of **VP (Italy) v SSHD EWCA [2010] Civ 806** (sic) which referred back to **LG (Italy) [2008] EWCA Civ 190** where Laws LJ (sic) 'Public security' to my mind is a broader concept. The earlier version of the manual referred in this connection to -

"national security matters, or crimes that pose a particularly serious risk to the safety of the public or a section of the public".

The words 'risk to the safety of the public or a section of the public' seem to me reasonably consistent with the ordinary understanding of 'public security'. In the latest version of the manual, the utility of that description is reduced, because it is used for the second level, 'public policy or public security', without distinction between the two parts.

3) The word 'imperative', as a distinguishing feature of the third level, seems to me to connote a very high threshold. The earlier version of the manual treats it as equivalent to 'particularly serious'. In the latest version, the expression 'particularly serious risk' is used for the second level. The difference between the two levels, that is, between 'serious' and 'imperative', is said to be 'one of severity', but there is no indication why the severity of the offence in itself is enough to make removal 'imperative'.

...

5) Neither version of the Manual seems to me to give adequate weight to the distinction between levels two and three, or to the force of the word 'imperative'. To my mind there is not simply a difference of degree, but a qualitative difference: in other words, level three requires, not simply a serious matter of public policy, but an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who (in the language of the Preamble to the

Directive) has become 'integrated' by 'many years' residence in the host state."

28. The inclusion of the final words of that citation from [32] of the judgment at [25] of the Decision shows that this is the test which the Judge was applying. She did not ignore the issue whether the Appellant represents a genuine, present and sufficiently serious threat. Her finding is that the Appellant may well go on to commit further offences. He may have embarked on rehabilitation but that is very far from complete. She did not directly refer to Schedule 1 but in substance, she considered the threat and the public interest by adopting the citation from the Court of Appeal's judgment as set out at [22] of the Decision. Any error would therefore depend on her having wrongly understood that authority or having failed to have regard to any change in the understanding of what imperative grounds require.
29. In Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199, the Court considered whether the judgment in LG which was cited by Judge Clarke had been overtaken by subsequent case-law. At [136] of the judgment, the Court stated expressly that "there is nothing in the statement of Carnwath LJ in **LG** (in the first Court of Appeal decision) that is inconsistent with what the CJEU has subsequently stated in **Tsakouridis** and **PI** on the scope of 'imperative grounds of public security'". The Court cited from Tsakouridis at [88] of the judgment as follows:
- "48. It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.
49. Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, *Metock and Others*, paragraph 74), and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure, provided that that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.
50. In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 77 to 79), by reference in particular to the possible penalties and the

sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, *inter alia*, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general."
[my emphasis]

30. Although FV was the subject of an appeal to the Supreme Court (Secretary of State for the Home Department v Vomero [2016] UKSC 49 and [2019] UKSC 35 following a referral to the CJEU), the Supreme Court's judgment did not disturb what was said by the Court of Appeal about the level of protection afforded by imperative grounds where such grounds are found to exist (and it could not do so in any event as what was said derived from a CJEU judgment).
31. Here, the Respondent has not argued that the Judge was wrong to find that imperative grounds exist. Having accepted that finding, the Judge did not err in her application of the relevant test. Returning to the way in which the Respondent's grounds were pleaded and argued, the Judge has not failed to have regard to the matters raised in Schedule 1 in substance. The Judge's conclusion depends on the level of protection which the Judge found to exist and with which the Respondent does not take issue.

CONCLUSION

32. The Respondent has failed to identify any error of law which is material to the outcome. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge S J Clarke promulgated on 6 March 2023 does not contain any material error of law. I therefore uphold the decision with the consequence that the Appellant's appeal remains allowed.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 May 2023