



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002163

First-tier Tribunal No: HU/01081/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ADNAN JAMA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr M. Karnik, counsel, instructed by Citywide Solicitors

Heard at Field House on 5 September 2023

DECISION AND REASONS

Introduction

1. Mr Jama is Dutch citizen, born on 25 August 1995, who claims to have come to the UK in 2002, aged 6. He has a string of convictions from drugs offences, the most recent of which being for possession with intent to supply of class A drugs and for which he was sentenced to 5 years, 7 months and 7 days imprisonment.
2. As a result of this conviction, the Appellant has sought to deport him to the Netherlands. On appeal, Mr Jama claimed his deportation would breach his retained free movement rights as an EEA citizen and amount to a breach of his Article 8 ECHR rights and, by a decision issued on 2 May 2023, First-tier Tribunal Judge Lodato allowed his appeal on both grounds ("**the Decision**").
3. The Secretary of State now appeals, with permission granted by First-tier Tribunal Judge Bartlett dated 16 May 2023, to this Tribunal.

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4. I have not been asked to make an anonymity order in this case and, in light of the importance of the open justice principle, I can see no proper basis for doing so.
5. At the hearing Mr Karnik appeared via video-link. Mr Terrell and I were in court at Field House. There were no technical difficulties and I was satisfied that everyone was able to communicate with one another with ease.
6. At the end of the hearing, I announced that I would dismiss the Secretary of State's appeal for reasons to follow in writing. These are those reasons.

The Decision

7. A preliminary, but central, issue before the Tribunal was whether the criminal conduct which underpinned the deportation decision took place before 11pm on 31 December 2020. If it did, the more favourable EU law regime applied. If it did not, Mr Jama's deportation fell to be assessed under the more stringent regime applicable to third country nationals. The EU law regime applied if, inter alia, "*the offence for which [Mr Jama] was convicted... consisted of or included conduct that took place before [11pm on 31 December 2020]*" (see s.342(6B) of the UK Borders Act 2007). The Judge held that it did, on the basis that "*from a natural reading of the...legislative provisions...it strikes me as tolerably clear that the real question to be assessed is when the underlying criminal conduct occurred [which] is to be distinguished from the date of arrest, conviction, sentence or even the date of the offence as set out in the counts on the indictment.*" The Appellant was arrested in the early hours of 1 January 2021, but the Judge found that he came into possession of the drugs several hours before 11pm on 31 December 2020 and so, because "a significant part of the conduct which underlies the criminality relied upon by the respondent occurred prior to 11pm on 31 December 2020" he had the benefit of the highest level of EU law protection.
8. I confess that I struggle with the Judge's logic in respect of this aspect of the case. The relevant statutory provision requires a focus on "*the offence for which [the relevant person] was convicted*". Here the offence on the indictment was possession with intent to supply on 1 January 2021. It may well have been that Mr Jama came into possession on 31 December 2021, but he was convicted for the offences on the indictment, which did not include any part of his possession (with intent to supply or otherwise) on that day. While I agree with the Judge that the assessment of the timing of the offence must be assessed without reference to the date of the arrest, conviction, or sentence, it seems to me that the date of the offence as set out in the counts on the indictment was of central relevance to assessing which regime applies.
9. Be that as it may, the Secretary of State has expressly conceded this part of the case in paragraph 1 of her Grounds of Appeal. Mr Terrell did not seek to go behind that concession and it would plainly now be unfair for me to do so of my own volition and without providing Mr Jama an opportunity to argue the point. Notwithstanding my reservations above, this appeal must therefore be decided on the basis that, as the Judge found, Mr Jama was entitled to 'top tier' protection and that the 'imperative grounds' test applies.
10. As there is no appeal against the decision that the imperative grounds test applies, it suffices for present purposes to set out the Judge's reasoning in respect

of whether the imperative grounds threshold was met. As to this, he stated at paras.32-37 as follows:

“32. In analysing whether there are imperative grounds to conclude that the appellant poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society, it is important to keep in mind that this is necessarily a risk assessment that is forward looking. I must exercise caution in not exclusively relying upon his past criminal conduct, but his track record is one of a range of factors which legitimately informs the conclusions to be reached about his prospects for the future.

33. There is very little in the authorities to assist in the interpretation of the meaning of imperative. However, I am assisted by the definition to be found in the Oxford English Dictionary. This defines the adjective as “of vital importance; crucial”. This gives a flavour of just how high this threshold is.

34. The nature of the appellant’s offending background shows that he has not been deterred from engaging in the supply of class A drugs even when on licence or under police investigation for like offending. I also note the professional and independent risk assessment performed by the Probation Service in the OASys report of 6 May 2022. At page 37 of that report, he was found to pose a medium risk to the public in the community. The appellant is still a young man and plainly capable, with advancing maturity, of changing his drug dealing habits. I accept that he has taken some steps to address his offending behaviour while in a custodial setting and has not tested positive for unlawful drugs during his current period of imprisonment. However, it would be overly optimistic to emphatically conclude on the evidence that he has turned a corner and will not return to a life of drug dealing upon release into the community. However, there is some room for reform such that reoffending is not an inevitability.

35. Notwithstanding the risk posed by the appellant of reverting to dealing drugs, I must not lose sight of the reality that he has in the past engaged in a form of unsophisticated ‘street dealing’. I take the point made by his counsel, informed by the sentencing remarks, that there is not an evidential basis upon which it could be concluded that he is a substantial player in the supply of drugs.

36. It appears to me that the fundamental interests of society engaged on the facts of this case are:

(c) preventing social harm;

(f) excluding or removing an EEA national or family member of 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;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(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;

37. *In my judgement, the threat posed by the appellant does not meet the imperative grounds threshold which is a high threshold reserved for the most egregious cases. The appellant poses a medium risk of re-engaging in the street supply of class A drugs but this risk falls short of touching on at least one of the fundamental interests of society to an imperative degree.*"

11. Finally, the Judge at para. 38, considered that as Mr Jama had a legal right to remain in the UK there could be no sufficiently strong public interest to outweigh his Article 8 rights.

Ground of Appeal and rule 24 response

12. The Secretary of State relied on the following grounds of appeal:
- a. First, it was said that the decision was inconsistent with the CJEU Grand Chamber's decision in C-145/09 *Land Baden Wurttemberg v Tsakouridis* [2011] 2 CMLR 11;
 - b. Second, there was a suggestion that the Judge's conclusion that Mr Jama was not a substantial player in the supply of drugs was not a finding open to him;
 - c. Third, it was said that the Judge failed to have due regard to Mr Jama's full offending history.
13. Mr Jama filed a Rule 24 response responding to the grounds of appeal and setting out his position in full. This is a helpful document to which I will refer further below.

Analysis

14. At the hearing, Mr Terrell, for the Secretary of State effectively withdrew the second and third grounds of appeal. In my judgment he was right to do so:
- a. The second ground was based on a false equivalence between the fact that it was accepted by Mr Jama that he played 'significant role' for the purposes of the sentencing guidelines, with the question whether he was a substantial player in the supply of drugs for the purposes of the imperative grounds test. As Mr Karnik pointed out in the Rule 24 response, in the former context, someone plays a significant role if they are motivated by financial or other advantage, whereas in the latter context, the CJEU has made clear in C-348/09 *PI v Obergurgermeisterin der Stadt Remscheid* [2012] EUECJ that for the imperative grounds test to be met in a case of, *inter alia*, illicit drug trafficking, the manner in which the offence was committed must disclose "*particularly serious characteristics*".
 - b. The third ground was, as Mr Terrell properly accepted, unfair to the Judge, who considered Mr Jama's full offending history to be "important" and considered it at paras. 32, 34, 36 and 37 of his decision.
15. That left only ground one. That was however in my judgment based on an obvious misreading of the decision in *Tsakouridis*. The relevant question before the CJEU in that case was whether the concept of imperative grounds of public

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security was capable of including within it the fight against crime in connection with dealing in narcotic as part of an organised group. The Court held that it was so capable. It did not however hold that participation in drug dealing as part of an organised group was necessarily covered by that concept and it emphasised that it was for the member state concerned to assess whether on an individual examination of the specific case, an individual's expulsion is in fact justified on imperative grounds of public security. That is precisely the task that the Judge undertook and he reached conclusions which were on the evidence before and submissions put to him (which, it is worth noting, included no submissions from the Secretary of State on whether the imperative grounds threshold was crossed) open to him. This ground accordingly also fails.

Notice of Decision

16. The decision of the First-tier Tribunal did not involve an error of law. The First-tier Tribunal's decision to allow Mr Jama's appeal accordingly stands.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 September 2023