



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004396
First-tier Tribunal No:
DA/00007/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

LD
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Wain, Senior Home Office Presenting Officer
For the Respondent: Miss Radford, Counsel

Heard at Field House on 8 November 2023

DECISION AND REASONS

1. Whilst it is the Respondent who is seeking leave to appeal today, I have hereinafter referred to the parties as they were identified in the First-tier Tribunal. Mr Dias will be referred to as the Appellant and the Secretary of State for Home Department will be referred to as the Respondent.
2. The Appellant is a national of Portugal, born on 8 December 2000. In February 2013 the Appellant joined his mother as an EEA national. Between 15 September 2014 and 8 December 2018 the Appellant was convicted as a youth of a variety of offences. All sentences were to be served within the community and included offences of common assault x 3, harassment, possession of Class B drugs x2, taking motor vehicle without consent and possession of class A drugs with intent to supply.

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3. On 17 July 2019 the Appellant was convicted of two counts of robbery and possession of Class B drugs and sentenced to 12 months detention and training order.
4. On 8 August, the Respondent wrote to the Appellant informing him that she intended to make a deportation order against him. On 16 January 2020, the Respondent served a deportation order on the Appellant.
5. On 17 February 2020 the Appellant was convicted of possessing a Class A Crack Cocaine and Class A Heroin with intent to supply as well as simple possession of Class B cannabis and was sentenced to 36 months detention at a Young Offenders Institution. Having been released as part of his sentence he was recalled to custody.
6. On 5 August 2022 he was returned to custody for a failure to engage with probation and be tagged at an approved address. He remained in custody until his release on 25 July 2023.
7. On 26 January 2023, the Appellant's legal representatives contracted the Salvation Army asking to refer him to the National Referral Mechanism ('NRM').
8. On 8 March 2023 the Appellant was referred and on 25 May 2023 the Single Competent Authority ('SCA') concluded that there were reasonable grounds to conclude that he had been a victim of modern slavery.
9. The Appellant appealed the Respondent's decision to deport him and the matter came before Judge of the First-tier Tribunal Loughran (hereinafter referred to as the FTTJ) on 8 August 2023 and in a decision promulgated on 15 September 2023 the FTTJ allowed the appeal finding:
 - a. The Appellant and his mother were both credible witnesses who provided truthful accounts.
 - b. The Judge accepted that between 2013 and 2020 the Appellant's mother exercised treaty rights as a worker. The Appellant's mother was exercising treaty rights for a continuous period of five years prior to 17 July 2019 while the Appellant was in the UK as her "family member". Accordingly, the serious grounds of public policy or public security threshold applied in this case.
 - c. The Appellant was a victim of modern slavery for the purposes of criminal exploitation. The Appellant's drug and robbery offences were committed whilst he was under the control of a criminal gang and formed part of his criminal exploitation.
 - d. Whilst the Appellant had only been released from custody for a short period of time he was in a very different situation than the that prior to his imprisonment. He now had secure accommodation, living with his mother, and has clear aspirations to find employment in construction.

- e. The Appellant's offences *'needed to be viewed in the context that at the time he was a victim of child criminal exploitation and grooming in the UK.'*
- f. The Appellant did not pose a genuine, preset and sufficiently serious threat affecting one of the fundamental interests of society.
- g. Even if the Appellant did pose a genuine, present and sufficiently serious threat the decision to deport him would not comply with the principle of proportionality because:
 - i. The Appellant experienced significant neglect and parental absence as a child.
 - ii. Despite their involvement Hackney Social Services and the Youth Offending Services did not identify the Appellant as a victim of modern slavery and/or provide him with appropriate support.
 - iii. The Appellant was a victim of modern slavery and his drug and robbery offences were committed whilst he was under the control of a criminal gang and formed part of his criminal exploitation.
 - iv. It did not appear that the police, prosecutors or sentencing judges considered whether the Appellant was a victim of modern slavery.

10. Permission to appeal was granted by First-tier Tribunal Judge Athwal on 22 September 2023 who found:

"2. The first ground asserts that the Judge made a material misdirection of law and provided inadequate reasoning on the risk of re-offending/harm. He failed to observe that the appellant did not raise his criminal exploitation until March 2023 despite being invited to submit further representations in 2019. Furthermore, the Judge failed to properly engage with the OASys report and erred in finding the NRM finding determinative. It is arguable that the Judge has failed to demonstrate that he took into account the Appellant's delay in raising criminal exploitation, and what weight he attached to that.

3. The second ground asserts that the Judge made a misdirection of law when considering proportionality. It is submitted that there are no reasons associated with the appellant's age, state of health or ability to work which makes the deportation decision disproportionate given he continues to rely on drugs for his personal use and very likely will reassociate with his gang and continue to reoffend to fund his habit. In the absence of any evidence to the contrary he therefore remains a genuine, present and sufficiently serious threat to minors and the public. It is arguable that the Judge has not demonstrated that he took these factors into account in his assessment of proportionality."

11. Mr Wain relied on the grounds of appeal and submitted there was an error in law.
12. Ground one of the grounds related to goes to Reg 27. He submitted that the FTTJ used NRM and expert report as determinative for finding the Appellant was a person who was not likely to re-offend. He submitted the FTTJ failed to engage with the findings contained in the OASYS report and the FTTJ had not taken into account the lateness in raising the fact he had been a victim of modern slavery. The expert report referred to the Appellant being exploited by others to sell drugs, but weight should have been placed on the findings made by the sentencing Judge. There was a difference in risk assessment between what was contained in the OASYS report to that contained in the expert report and the FTTJ did not adequately reason why the findings in the expert report preferred.
13. Ground two centred around the FTTJ's approach to Schedule 1(7) of 2016 Regs (para 39 of decision). Mr Wain submitted the FTTJ did not apply this to his assessment. Additionally, the FTTJ appeared to approach Regulation 27(6) of the 2016 Regulations that he was a victim of modern slavery but in finding the decision was disproportionate the FTTJ failed to consider all the factors contained in Schedule 1(7).
14. Miss Radford adopted the Rule 24 response and submitted there was no material misdirection by the FTTJ and the FTTJ had properly followed the approach set out in R (Iran) [2005] EWCA Civ 982.
15. Dealing with ground one Miss Radford submitted the Respondent's decision to deport the Appellant failed to identify the Appellant as a victim of modern slavery despite the author of the OASYS report having mentioned the Appellant had been exploited.
16. The FTTJ considered the sentencing remarks, the OASYS report and the expert report and concluded the latter report was more useful than the other reports as it took into account the trafficking issue. She submitted it was clear why the FTTJ accepted the recommendations of that report. The FTTJ did not err by accepting this report rather than the evidence advanced by the Respondent.
17. Both the OASYS report and the subsequent expert report considered risk factors and whilst the OASYS report concluded there was a medium risk and the expert report concluded there was a low risk there was in reality little difference in the assessment of the risk posed by the Appellant.
18. The FTTJ had set out Regulation 27 of the 2016 Regulations and accepted the Appellant was a credible witness. The FTTJ placed weight on the fact the Appellant had been trafficked and groomed when considering Regulation 27(6) of the 2016 Regulations.
19. With regard to the second ground, Miss Radford submitted Mr Wain had not identified which part of Schedule 1 had not been dealt with by the FTTJ. Miss Radford submitted the FTTJ dealt with the issue of risk and argued the

FTTJ had concluded that the Appellant's past offending did not establish future risk. However, even if his past offending did establish a future risk this overlooked the fact it was now accepted the Appellant had been trafficked and he was not protected by the State. The findings made were open to the FTTJ especially as the FTTJ accepted the Appellant's evidence that he was no longer using drugs and was not mixing with his former peers and the FTTJ placed weight on the expert report.

20. Mr Wain reminded the Tribunal that it was incumbent on the FTTJ to consider both the OASYS report as well as the expert's findings on pages 34 and 35 of her report.
21. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (512008 /269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

DISCUSSION AND FINDINGS

22. Having heard submissions from the two representatives I find there was an error in law and I now give my reasoning for this decision.
23. Mr Wain advanced two grounds of appeal namely the FTTJ's approach to Regulation 27 of the 2016 Regulations and the fact the FTTJ did not consider all the factors contained in Schedule 1(7) of the 2016 Regulations.
24. Regulation 27 sets out the approach to be taken when considering a removal on grounds of public policy, public security or public health. This provision applied as the FTTJ concluded, for unchallenged reasons, that the Appellant's appeal should be considered under this provision.
25. The FTTJ dealt with the issue of whether the Appellant was a victim of modern slavery and the risk of re-offending/harm in paragraphs [49] to [56] of her decision and Mr Wain has submitted that this assessment was flawed as there was no weight attached to the previous OASYS report and the sentencing comments of two Crown Court Judge and too much reliance was placed on the report of Miss Symmonds and the evidence of the Appellant and his mother. Miss Radford counter argued that there was no error and that the FTTJ simply preferred the report of Miss Symmonds and reached findings that were open to her.
26. Looking at the evidence and FTTJ's decision it seems the FTTJ was aware of the Appellant's convictions for robbery and possessing drugs with intent to supply. She was also aware that the sentencing Judge concluded the Appellant was motivated by financial or other advantage and was selling the drugs to vulnerable users on the street. His role in the drug offences was viewed seriously as the starting point for sentencing purposes was 60 months which was then reduced, after then giving the Appellant credit for his guilty pleas and other mitigating factors, to 36 months. The FTTJ was

also aware the issue of modern slavery was not argued before the Crown Court either in 2019 or 2020.

27. The FTTJ had before her the Appellant's OASYS report which had been prepared on 24 August 2022. It is important to note when this was prepared and that this was not a document before the sentencing Judge. It was prepared after the Appellant had been recalled to custody for non-compliance with his licence requirements.
28. The OASYS report concluded the risk of general offending within one year was 56% and 73% within two years. The risk serious recidivism (likelihood of serious re-offending) over the next two years was placed as medium. The report recorded that the Appellant appeared somewhat blasé about his offences and minimised the seriousness of them demonstrating little to no awareness of the effect his behaviour could have had on his victims and he told the author of the report that he did not consider the consequences of his actions to be so serious. The author of the report did speculate (page 78 of the consolidated bundle) that as a child his family and financial circumstances resulted in him being exploited by older males to sell drugs.
29. It was this reference to the Appellant possibly being exploited that led to the Appellant's solicitors lodging fresh submissions against the deportation on 31 January 2023 and advising that a referral to the NRM was to be made. Miss Radford referred to the fact the Respondent did not consider the finding in the OASYS report when issuing her decision. It is a matter of record that the referral was in fact made by the Salvation Army on 31 March 2023.
30. The FTTJ referred to this referral in her decision and noted that on 25 May 2023 there was a finding that there were "reasonable grounds to conclude he was a victim of modern slavery". This letter makes it clear that the Appellant's case would be looked at in more detail to decide if there were "conclusive grounds" to believe he was a victim of modern slavery. In other words, a final decision had not been made although the Respondent was prepared to consider the case further. It is my understanding the final decision is still pending.
31. Prior to this SCA finding being made on 25 May 2023 the Appellant was seen by Miss Symmonds, a registered and chartered forensic psychologist. That report is contained in the Appellant's bundle (page 170-209) of the combined bundle. The FTTJ was aware of the author's conclusions including her finding at paragraphs 1.2 and 1.3:

"1.2 In my opinion, from his narrative if this is considered to be true, Mr. Dias is reporting experiences consistent with criminal exploitation, and it appears that he was recruited into exploitation within the UK related to county lines drug supply. In my view, he meets the **Action** criterion, in that he was recruited, initially through a process of grooming, manipulation and deception, and very soon following this was subjected to debt bondage, attempted physical harm and perception of harm directed towards

him and his family by indicating they knew where he and his family lived.”

“1.3 In my opinion, if Mr. Dias’s account is to be regarded as being true, all three constituent elements of the Modern Slavery Act (2015) are indicated in his account of his experiences linked to the index offences in November 2019. It is my view that there are sufficient indicators present to support the referral that has been made to the National Referral Mechanism (NRM) for his consideration as a potential victim of trafficking. Mr. Dias is awaiting the outcome of the referral.”

32. Given the SCA had not provided a final decision on the question of modern slavery it was incumbent on the FTTJ to consider all the evidence and make that finding on the totality of the evidence and to not treat the May 2023 decision as determinative. The FTTJ should have set out why she preferred the evidence of Miss Symmonds to all the other evidence and why she treated the SCA decision as determinative. There did not appear to be any consideration of the two sentencing judgements, the Appellant’s own admissions that he sold drugs for money and the Appellant’s acknowledgment he was associated to two gangs or the findings of the OASYS report.
33. The FTTJ’s assessment was flawed because it accepted the SCA’s finding as determinative when in fact the finding should have been treated as another piece of evidence.
34. If there had been a conclusive finding from the SCA then it would have been open to the FTTJ to place significant weight on that piece of evidence. The SCA’s recommendation was simply a factor to take into account and should not have been a determinative factor. Miss Symmonds is a psychologist and she did not say he was a victim of modern slavery but simply speculated that if his account was to be regarded as true then he would be reporting evidence of criminal exploitation.
35. The FTTJ erred because the SCA finding was given too much weight compared to the OASYS report, the delay in not making this claim until almost three years after conviction and what the other evidence stated. If the FTTJ had properly considered all this evidence and given reasons for accepting what was said then there would not have been an error. The fact this was not done leads me to the conclusion there was an error in law.
36. Having made that finding I have not considered the second ground in any detail. However, it seems to me the error which occurred in ground one also impacts on ground two.
37. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

- a. the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - b. the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
38. In my judgment, given that it is necessary for all the issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) and (b) because further evidence, including oral evidence is likely, and findings of fact on the above issues will need to be made.
39. The Tribunal should preserved the finding made at paragraph [48] of the FTTJ's as this was not appealed by the Respondent. The starting point for any future Tribunal is that the serious grounds of public policy or public security threshold will apply in this case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety.

40. This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a Judge other than Judge of the First-tier Tribunal Athwal.

Deputy Judge of the Upper Tribunal Alis
Immigration and Asylum Chamber

20 November 2023