



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004893

First-tier Tribunal No:
DA/00163/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of February 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAFAL JANCZ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

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

For the Respondent: Ms A Kowalik, Solicitor

Heard at Field House on 2 January 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge G Richardson, promulgated on 30 September 2023, allowing the respondent's appeal against a decision to deport him pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").
2. The respondent is a citizen of Poland born on 23 August 1985. The respondent was convicted upon his own confession of two firearms and drugs offences to which he was sentenced to five years' imprisonment (in respect of the firearms offences) and two and a half years in respect of the drugs offences which were to be served consecutively.

3. In her refusal letter the Secretary of State accepted that the appellant had a permanent right of residence but concluded that the appellant did not automatically qualify for the protection on imperative grounds of public security grounds. She considered that the appellant presented a significant threat, observing that the OASys Report found that he posed a high risk of harm to the public in the community noting that he had not been interviewed by the offender manager [29]. It was considered he had played a significant role in the supply of drugs indicated by the sentence imposed but having taken into account all the evidence concluded that the appellant presents a continuing threat to society and would be justified even were imperative grounds of public security to apply [51] as criminality is not restricted to attacks on the state but can include serious criminality [52].
4. The Secretary of State considered also that removal would be proportionate on Article 8 terms, there being no very compelling circumstances why he should not be deported.
5. The respondent appealed against that decision submitting that he did meet the imperative grounds test, did not present a genuine, present and sufficiently serious threat; and, that in any event his deportation would be disproportionate.
6. The judge found:-
 - (i) the appellant had resided in the United Kingdom for at least ten years and that the correct test to apply was whether his deportation was required on the basis of imperative grounds of public security [10];
 - (ii) that the OASys Report gave a low score for the likelihood of serious reoffending in the next two years, except a medium risk to the public [12, 13]; and that there was an overall low risk of reoffending;
 - (iii) that the risk posed by the appellant was now low, he had made positive steps in custody and there was no evidence of any negative attitude or behaviour and accordingly his removal was not justified on the basis of imperative grounds of public security [18];
 - (iv) having regard to the principle of proportionality, and given the finding that he would not present a risk, then a decision would not be proportionate given also the length of the appellant's residence in the United Kingdom and that his two school aged children have lived their entire life in the United Kingdom.
7. The Secretary of State sought permission to appeal on the grounds that the judge had erred:-
 - (i) in failing to have regard to Schedule 1 of the EEA Regulations, in particular not assessing the firearms offences when assessing his continued risk to public security and incorrectly noting the findings in

the OASys Report, the report actually recording a high risk to the public rather than a medium risk and there is no sufficient basis to depart from that finding;

- (ii) as the findings that the appellant's actions were indicative that he was not financially struggling and that his priorities and motivations for personal gain were not explained, this raising obvious credibility issues given the explanation that he had become a drug courier due to financial concerns;
- (iii) in his overall assessment the risk of reoffending if the appellant associates himself with the same criminal peers as before and accordingly the findings on this issue were inadequately reasoned;
- (iv) in failing to apply the "leading case law" of Tsakouridis [2010] EUECJ C-145/09 where it was found that dealing in narcotics as part of an organised group could reach a level of intensity covered by imperative grounds of public security and that the judge had inadvertently relitigated the appellant's criminality by accepting his claim as to why he became involved, that he had not entered into criminality against his will;
- (v) in failing to refer to the appellant's firearms offences in assessing the threat the appellant now possesses.

The Hearing

8. I heard submissions from Mr Wain and Ms Kowalik. During the course of submissions it became clear that there were in fact two OASys Reports, one of twelve pages length and the second later and longer one of 747 pages. It is that later one to which the judge refers in his decision but the former to which the grounds refer.

The Law

9. The EEA Regulations provided as follows, so far as they are relevant.

- 27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
- (2) A relevant decision may not be taken to serve economic ends.
- (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
- (4) ...
- (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) ...

(7) ...

(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.).

10. The First-tier Tribunal was also duty-bound to take into account Schedule 1 of the 2016 Regulations which provided as follows, so far as is relevant:

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

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.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

...

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

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(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;

11. It is important to bear in mind the context in which the EEA Regulations were to be interpreted and applied, which is that the right of free movement is a fundamental right and curtailment of that must be proportionate. That is the overriding consideration implicit in the phrase “sufficiently serious”. It follows from the jurisprudence that restrictions on the right of free movement are to be narrowly construed even though there are parameters within which a state can choose what its fundamental interests are.

12. In Straszewski v SSHD [2015] EWCA Civ 1245 Moore-Bick LJ held:

13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1 C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.

14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.

13. The decision in *Tsakouridis* is of little assistance given it left open to the referring court to decide whether the involvement in the drugs trade *could* give rise to imperative grounds of public security. The ECJ returned to the issue in *PI* [2012 EUECJ C-349/09 as set out in *FB* (Italy) [2012] EWCA Civ 1199 where the Court of Appeal said this:-

89. In *PI*, it was recognised that 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 grounds" (paragraph 20). It was also noted that Union law does not impose on Member States a uniform scale of values as regards the assessment of conduct which may be considered to be contrary to public security (paragraph 21). However, the court added, at paragraph 23:

"While Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union (see, inter alia, Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23, and Case C-434/10 *Aladzhov* [2011] ECR I- 0000, paragraph 34)."

90. At paragraph 28, the Court related the expression under consideration to article 83(1) of the Treaty:

"It is apparent from the above that it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU [Treaty on the Functioning of the European Union] as constituting a particularly serious threat to one of

the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

14. Whilst the decision of the Court of Appeal was overturned in SSHD v Franco Vomero [2016] UKSC 49 the issues on appeal were not related to what constitutes "imperative grounds", nor indeed were they subsequent to the reference to the Court of Justice resulting in Vomero [2019] UKSC.
15. Also of note is the decision of the Court of Appeal in Hafeez v SSHD [2020] EWCA Civ 406, in particular at [45] to [53]. It is of note that in that case LG and CC (EEA Regs: residence, imprisonment, removal) Italy [2009] UKAIT 00024 was approved.
16. In assessing the First-tier Tribunal's approach to this matter I bear in mind what was said in Volpi v Volpi [2022] EWCA Civ 464 and Riley v Sivier [2023] EWCA Civ 71. In this case it is clear that the judge has referred to Schedule 1 and there is no substantive basis to consider that the judge had not properly applied Schedule 1 in assessing areas of public policy. There is, as Mr Wain accepted, little merit in what is stated in paragraph (c) ground 1 given that the judge clearly referred to the later OASys Report which at 47 pages is more detailed and postdates the report relied upon by the Secretary of State. The judge was therefore correct to state that the risk was medium as was recorded in that, more detailed and slightly later decision and it is of note that, perhaps unusually, the risk of further offending was said to be 0.26% over two years. That is remarkably low. In the circumstances there is no merit in the Secretary of State's assertion that the judge erred in the approach to the OASys Report; on the contrary, it is the Secretary of State who has erred in referring to a report which predates that which the judge referred to without mentioning this.
17. It is sufficiently clear from the fact that the judge referred to the OASys Reports and the offending that he was aware that there were firearms offences involved but it is difficult to see how unless that was the object of a specific submission from the Secretary of State, for which there is insufficient evidence, that the judge had not taken into account.
18. The observations in subparagraphs (d) and (e) of ground 1 are equally without merit. The reference to the OASys Report at (e) is to a report that had been superseded and is in fact little more than submissions. Similar concerns arise in respect of the grounds at (b). If the Secretary of State asserts the judge should have taken material matters into account then they should be able to be in a position to show that these were in fact raised. To suggest, without it having been put to the judge, that he should somehow have taken into account the fact that the respondent was in possession of a large gold watch whilst driving a BMW X5 indicates he was

not financially struggling and that this raised credibility issues is without merit.

19. It is sufficiently clear with respect to ground 2, that the judge was aware of the case law relevant to imperative grounds of public security. As will be noted from the outline of the case law above, Tsakouridis says only that dealing in narcotics as part of an organised group *could* reach the relevant level of intensity. A more nuanced discussion was held in PI, and there has followed a significant amount of case law from the domestic courts set out above is applicable. Having found that the respondent is entitled to imperative grounds of public security level of protection and having legitimately found that the respondent presents a low risk it is not arguable that the judge erred in allowing the appeal given the high threshold the Secretary of State needed to reach to demonstrate deportation was proportionate.
20. Again, what is averred in paragraph 2(b) and (c) of the grounds is simply submissions. As noted above in LG and CC, the length of sentence is not necessarily relevant and it is the risk that is in issue. Insofar as it is suggested that the judge erred in concluding that the appellant's criminality was motivated by trying to provide financially for his family, is inconsistent with the finding made by the sentencing judge that it was done for personal gain, this is unsupported by what is said by the judge. It is simply not the case that the judge, contrary to the supposition introduced in the grounds of appeal, that "he was not forced into criminality against his will" has any merit whatsoever. Accordingly, for these reasons, I am not satisfied the decision of the First-tier Tribunal involved the making of an error of law as identified in the grounds of appeal.
21. It is, however, worrying that the grounds for the most part rely on an assertion that the judge had mistakenly said that the respondent presents only a medium risk of harm to the public. The entirety of paragraph 1(c) of the grounds is based therefore on a false premise and it is of significant concern that the grounds were drafted by reference to an OASys report postdated and which is not referred to. Such selective use of material is worrying.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date: 2 February 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal