IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002083
First-tier Tribunal No: EA/09470/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 September 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE LANDES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GRZEGORZ DUDEK
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Biggs, Counsel, instructed by the Home Office
For the Respondent: Mr S Kerr, instructed by Karis Solicitors

Heard at Field House on 28 August 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Abdar, promulgated on 10 April 2024, allowing Mr Dudek's appeal against a decision of the Secretary of State made on 6 May 2022 to deport him and to refuse his human rights claim. The Secretary of State also refused his application under the EU Settlement Scheme ("EUSS") on suitability grounds owing to the deportation decision.

2. On 16 October 2019, the respondent was convicted on two counts of "conspire/sell/transfer prohibited weapon/ammunition" ("the index offence") to a person other than a registered firearm dealer. He was sentenced to five and two years' imprisonment on the two counts to run

concurrently. On 14 December 2019 he applied for leave to remain under the EUSS.

3. On 6 May 2022 the Secretary of State made a decision to deport the respondent, also refusing a claim pursuant to article 8 of the European Convention on Human Rights and on the same date also refused his EUSS application on the grounds of suitability owing to the deportation decision.

The Parties' Cases

4. The Secretary of State's case, as set out in the decision letter of 6 May 2022, is that the respondent's deportation is justified even though it was accepted that he had resided in the United Kingdom for a continuous period of at least ten years and [27] the test was whether his deportation was justified on the imperative grounds of public security. She concluded, having had regard to the factors set out in Schedule 1 to the EEA Regulations, his previous offending behaviour, the sentencing remarks and the OASys Report and the likelihood of harm caused and the likelihood that he would offend again that it was imperative that he should be deported in order to preserve the safety and security of those resident in the United Kingdom [56].

5. The Secretary of State considered also that his removal would be proportionate and justified. She considered also that it would not be a breach of his article 8 rights to remove him having had regard to the seriousness of his offence.

6. The Secretary of State considered also, in consequence, that the respondent was not entitled to leave under the EUSS given that he did not meet the suitability requirements owing to the deportation order.

7. The respondent's case is that his deportation is not justified on imperative grounds; that his deportation would not be proportionate; that he is entitled to leave under the EUSS; and, his deportation would be in breach of his Article 8 rights.

The Hearing Before the First-tier Tribunal

8. The judge heard evidence from the respondent, his mother and his sister. He also had before him bundles prepared by the representatives. Having set out the submissions and the offending history the judge set out the relevant legal framework [20] to [23] before addressing a preliminary matter, which was an opposed application by Mr Kerr (who appeared for the respondent below as well as before us) to amend the grounds of appeal to include an appeal against the EUSS decision. The judge noted [29] that the Secretary of State had conceded that the respondent meets the ten years' continuous residence requirement, and [30] that he agreed with the Secretary of State's approach that the respondent is eligible for the highest level of protection against deportation.

9. The judge then went on to consider the case law relevant to deportation on imperative grounds [34] to [36].

10. The judge concluded that:-

(i) the index offence did not reach the imperative grounds threshold [46];

(ii) the respondent did not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society to justify his deportation [52]; and

(iii) removal would be disproportionate; and,

(iv) as the appeal against the deportation decision had been allowed, the refusal on suitability grounds under the EUSS was not applicable and thus the appeal was allowed on that basis also.

11. The Secretary of State sought permission to appeal on three grounds. On 3 May 2024 First-tier Tribunal Judge S P J Buchanan granted permission on ground 3 only. The Secretary of State renewed the application in respect of the other grounds, but permission was refused by Upper Tribunal Judge Bruce.

The Hearing

Preliminary Matters

12. In preparing for the hearing, we noted that the bundle uploaded by the Home Office omitted half of the decision letter and the grounds of appeal. Mr Biggs was, however, able to provide us with the full decision letter but it is of significant concern that such important documents could have been omitted from a bundle and it would appear that the bundle was not properly checked before it was uploaded.

13. Both representatives presented us with skeleton arguments which we found of assistance in reaching a decision.

14. Having heard submissions, we indicated that we would dismiss the Secretary of State's appeal for the reasons to be given in writing, which we now do.

The Law

15. We address the grounds in turn. In doing so, we bear in mind the following. As was noted in Ullah v SSHD [2024] EWCA Civ 201 at [26]:

> 26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
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> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary*

of State for the Home Department [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];

(ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at paragraph [45];

(iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];

(iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];

(v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];

(vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107].

16. Further, we bear in mind what was said in Volpi v Volpi [2022] EWCA Civ 464 at [2]. and in HA (Iraq)[2022] UKSC 22 at [72].

17. The decision must be read sensibly and holistically and that it is not necessary for every aspect of the evidence to have been addressed, nor that there be reasons for reasons. We also bear in mind that the judge had all the evidence before him and that there is a danger of grounds "island-hopping" the evidence. Further, as Lewison LJ observed in Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]:

> ii. The trial is not a dress rehearsal. It is the first and last night of the show.

18. Justice requires that the reasons for a decision enable it to be apparent to the parties why one has won and the other has lost: English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [16]. When reading the decision, we are entitled to assume that the reader is familiar with the issues involved and arguments advanced. Reasons for a judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

19. The Secretary of State's case, as set out by Mr Biggs in his skeleton argument, focuses primarily on four points. We deal with these points not in turn but by commencing with point 4 as did Mr Biggs. We accept that it is, as he submitted, the primary point.

20. In summary, the submission made is that the judge needed to assess first whether the index offence was capable of reaching the imperative grounds threshold before considering the risk posed by any reoffending. At paragraphs 46 and 47 the judge wrote:

> 46. On a holistic view, I find the Appellant's past offending resulting in a caution at the age of 15 and failing to pay a railway fare not to be high on the seriousness scale. In respect of the Appellant's index offence, the EEA Regulations provides for a distinction to be made on the seriousness of the offending and I repeat that I find the Appellant's index offence to be serious. However, in consideration of the Appellant's circumstances at the time, including the Appellant's integration and the "limited role" ibid. the Appellant played, in my view, the index offence does not reach the imperative grounds threshold. As an illustration only and not a guide, I proffer Mr Wallace or Mr Brown's roles in the index offence against the Appellant's background and the resultant sentences as being ample to satisfied the imperative grounds threshold.
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> 47. In any event, I proceed to consider the threat the Appellant poses to the fundamental interests of society and defer to paragraph 7 of Schedule 1 of the EEA Regulations on those interests. I also take into consideration all of the above.

21. The submission made is that the judge failed properly to reason why the index offence did not reach that threshold. It was submitted that the judge was required to look at the nature and impact of the offence and that the nature and impact of the offence although not specifically raised in submissions to the Secretary of State had been raised adequately and that the judge was required to deal with it. He submitted further that the judge had failed properly to apply LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 and that the exact circumstances of events needed to be considered.

22. In response to questions from the bench, Mr Biggs said that he was not suggesting that there was a two-stage test whereby a judge was required first to assess whether an index offence reached that threshold but that it was a circumstance and then consider the risk but that the index offence was an important factor in assessing the risk of future offending. He submitted further that there was sufficient evidence before the judge as to the nature and impact of the offence that he ought to have engaged with as well as, as set out in the sentencing remarks, that it was likely the appellant would be linked to serious crime and the impact on the public and the offending was part of a pattern albeit that the respondent was the least culpable person involved in the incident in the offending. It was submitted further that taking into account the OASys Report and the sentencing remarks this was sufficient to suggest the respondent was

connected to organised crime and that there was a failure properly to consider and give reasons for this.

23. In response Mr Kerr submitted that the decision needed to be read in context and that it was sufficiently clear from paragraph 37 of the decision that the judge had borne in mind the nature of the offence, had all the facts in front of him and had not taken an unreasonable position. He submitted further that organised crime was a term of art and different from serious crime and that this simply did not, as was clear from the sentencing remarks, amount to organised crime.

24. In reply Mr Biggs submitted that paragraph 37 did not assist the respondent as the judged had simply not engaged with the nature and impact of the offence given that the threshold was met.

25. It is we consider important to bear in mind that as was set out in LG and CC at [103] that we note the use of the word "may". Further, as is sufficiently clear both from Straszewski v SSHD [2015] EWCA 1245 and SSHD v Dumliauskas [2015] EWCA Civ 145 what is relevant is the risk. As Mr Biggs properly accepted, there is no two-stage test. In effect what is called for is an evaluation of the offending, and its impact as that is relevant to whether someone is likely to offend again and in what way they are likely to offend again. Whilst what the judge wrote could have been more clearly explained, it is evident from what the judge said at [37] that he took into account and had assessed the seriousness of the index offence, noting in particular that the starting point had been eight years which was reduced to five years. He also assessed the OASys Report and assessed the evidence from the probation officer which had been put before him.

26. The phrase "the index offence has not reached the imperative grounds threshold" is unfortunate but taken in the context of what is said in the final sentence and also in the analysis of a current risk [52] the judge's reasoning is adequate and sufficiently clear. In summary, the judge considered that the threat that the appellant posed was not sufficient such as to meet the test whereby the imperative grounds of public security were met. We note in passing that this a high threshold for the Secretary of State to meet.

27. We turn next to points 1 to 3 which are, to an extent, interlinked with the previous point.

Point 1

28. There is no merit in the submission that the judge was under a duty to or failed to consider the possibility of any increase in the risk the respondent poses once his co-defendants were released. First, there is insufficient basis that this was a point put to the judge nor for that matter would it have been possible for a judge to undertake such an exercise. No evidence had been put before the judge as to the co-defendants' release dates and it would have required a significant degree of speculation as to

what they would be given that they were, as appears to be the case from the sentencing remarks, still likely to be in prison. Further, there would have to be an assessment as to whether they were likely to serve part or all of their sentences. In addition, and contrary to what is submitted we consider that there were adequate reasons given as to why it is said that he had removed himself from his associates and peers. That is sufficiently supported by the evidence of the respondent which the judge accepted and partly also from the OASys Report.

29. A proper analysis of the OASys Report indicates that it is in part an evaluation of risk at a specific point. It identifies negative and positive factors, including those likely to diminish risk of future offending. The judge noted the respondent's oral evidence and the probation officer's evidence [51]. He noted also an apparent change in motivation and the fact the respondent had to a significant extent engaged with the Probation Services albeit not fully complying and had engaged with the community [50] as well as taking responsibilities. We consider that these conclusions were adequately and sustainably reasoned. As Mr Biggs accepted, this point was a rationality point.

30. We observe as an aside, and in passing, that had the judge decided that there was an increased risk if the respondent were to associate again with those he had been with his co-defendants when released, that would have been open to a challenge on a rationality basis given that it would have involved undue speculation.

Point 2.

31. We do not accept that the judge erred in failing to provide adequate and sustainable reasons for his assessment of risk in the light of the OASys Report. It is perhaps unfortunate that the full report was not provided to the judge, but it is nonetheless important to observe that the judge took into account the sentencing remarks, the evidence of the appellant and his probation officer as part of a whole. The OASys assessment properly understood as provided is a summary. It sets out when the risk is likely to be at its greatest at R10.1 to R10.3 and identifies what is likely to increase risk. Equally the report sets out at R10.5 what factors are likely to reduce the risk. Whilst it is clear that one of those is engaging with the Probation Service there is little merit in Mr Biggs' submission that there had not been compliance. What he means is that there had not been complete compliance. The factors identified as increasing the risk such as wanting to have large sums of illegal money and starting to sell drugs were to an extent speculative and the judge gave adequate and sustainable reasons for concluding why the appellant's attitudes had now changed.

32. It needs in any event to be borne in mind that an OASys assessment is a snapshot at a particular time. Equally at R11.12 it is stated that the respondent is very motivated to address offending behaviour. Issues identified for supervision is who he would see, did he have support of family and friends and how that could be supported as well as

engagement with the community resources. All of those had been addressed as the judge found. Contrary to what is submitted the judge did not solely rely on the passage of time for attaching less weight to the report and it is not a case where the judge attached no weight or little weight to the report. His evaluation was one properly reasoned and open to him.

Point 3

33. Contrary to what is submitted the judge did engage with the appellant's offending in prison, it is sufficiently clear from the decision that he was aware of it. He gave adequate and sustainable reasons for considering why this was not a matter which was relevant to assessing further risk and, as noted above, the appellant had been broadly compliant and there did not appear to be any real concerns.

34. For these reasons, and as stated at the end of the hearing, we conclude that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

35. It follows from our upholding of this decision that the remainder of the decision on which that is based is also sustained.

Notice of Decision

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

Signed Date: 24 September 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal