



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00356/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19 March 2019

Decision & Reasons Promulgated
On 27 March 2019

Before

**THE HONOURABLE MR JUSTICE DINGEMANS
UPPER TRIBUNAL JUDGE COKER**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JURGITA [M]

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms B Smith, Counsel, instructed by IR Immigration Law LLP

DECISION AND REASONS

1. This is an approved transcript of an extempore decision and reasons given on 19 March 2019. This is a hearing of an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Parkes, whom I will refer to as the judge, in a decision promulgated on 20 November 2018. The decision followed the hearing of an appeal heard on 5 November 2018 and the appeal was by the appellant, Jurgita [M], against the decision of the Secretary of State dated 15 May 2018 to make a deportation order against Ms [M]. The judge allowed Ms [M]'s appeal against the deportation order on the basis that the Secretary of State had not

made out the grounds necessary to deport an EU national living in the United Kingdom.

2. The grounds of appeal are that the judge erred in law in finding that Ms [M] did not demonstrate a sufficient threat so that her deportation could be justified under the Immigration (European Economic Area) Regulations 2016, which I will refer to as the 2016 Regulations, and that deportation was not a proportionate response and that the judge failed to have regard to the considerations set out in Schedule 1 of the 2016 Regulations. Permission to appeal was granted on 13 December 2018.

The relevant factual Background

3. Ms [M] is a Lithuanian national and claims to have entered the United Kingdom in 2009 with her two children. It is apparent that she was joining her mother, who had been present from about 2003, and her brother, who had been present from about 2007. Ms [M] does not have a permanent right of residence because she has had an intermittent work record.
4. On 15 November 2015 Ms [M] was living with her then partner, [AS], at a property and they were at that stage supplying a class B drug, MCAT, to a person called [LT]. He visited the property, it seems at Mr [S]'s request, on 15 November and then he was falsely imprisoned by Mr [S] with Ms [M] in support. Mr [T] was a drug addict and he had lived in Gainsborough and he had an established supplier but he had been obtaining drugs for about the two weeks before 15 November from the property shared by Mr [S] and Ms [M]. Mr [S] and Ms [M] were convicted of supplying MCAT at the trial. There were dealer lists, plastic bags, £1,000 in cash, all indicating ongoing drug supply.
5. Mr [T] attended the property but for reasons not disclosed by the evidence but which the trial judge was sure related to the drugs Mr [T] was assaulted, kicked and punched by Mr [S], who was also threatened with a gun and hit with an extendable baton. Mr [S] and Ms [M] then called the other three defendants at the trial to the property so that they could continue the assault on Mr [T]. Mr [T] was waterboarded and hit. The whole incident lasted for at least two hours. The judge was unable on the evidence to give any further determination as to time. Ms [M] took photographs which the judge was sure could be used to threaten other persons who might cross Mr [S] in the future.
6. Mr [T] was released, it seems because of the intervention of one of the other defendants, and reported matters to the police. On arrest, Ms [M] made a number of admissions in interview to the police about phoning the others and living at the property at which the drugs were supplied and the judge described that as a partially candid account, which was obviously partly to her credit, but thereafter Ms [M] pleaded not guilty and lost any credit which she would have obtained and was remanded in custody. She was then diagnosed with a very serious illness which required treatment and she was released on bail.
7. Ms [M] did not plead guilty at trial and was convicted after a trial of false imprisonment of Mr [T] and the supply of the MCAT but acquitted of assaulting Mr [T]. In the sentencing remarks the judge explained the convictions and acquittals on

the basis that Ms [M] had taken no part in any of the assaults but had called the others, knowing full well that Mr [T] was going to be detained. On 3 November 2017 Ms [M] was sentenced at the Crown Court at Lincoln. She was noted by the judge to be 35 years old, of good character, with two children then aged 16 and 11, living with her mother. The judge had read references and said: "It is clear to me that what you did was totally out of character. You were in the wrong place at the wrong time with the wrong people." Those are important comments to consider when we address the Secretary of State's appeal.

8. Ms [M] was sentenced to five years' imprisonment for the false imprisonment, which was concurrent to a six month sentence for supplying MCAT. Although there is a letter from the Secretary of State which suggests that that sentence for supply was varied to be a confiscation order it seems likely that the six month sentence remained concurrent and a separate confiscation order was made. The judge found Ms [M] was present from start to finish, summoned reinforcement in the full knowledge of what was to happen and took photographs of Mr [T] during the assault but was acting under pressure from Mr [S]. Mr [S] was found to be dangerous, namely that there was a significant risk to the public of serious harm occasioned by the commission of further offences and given an extended sentence. I have already identified what was the sentence for Ms [M].
9. After her incarceration pursuant to the sentence imposed by the judge, an OASys Report was produced. The best evidence we have, page 2 of 20 of the report, is that it was signed on 22 November, after sentence, and countersigned on 7 December 2017. There was a date at the top of 19 March 2018 but that appears, doing the best we can, to be the date it was printed. So far as is material, at page 6 of 20, the general risk of offending within one year of community sentence was identified using the tools available to be 6% and the general risk of offending within two years was identified at 11%. So far as is material, at page 16 of 20, the risks in the community were identified as low for children, low for public, medium for a known adult, which must be Mr [T], and low for staff. The risks in custody were all low.
10. It is also right to note the following matters: that after imprisonment Ms [M] has now separated from Mr [S]; in prison she has won awards for painting and sculpture and obtained a level 1 award in food safety awareness, catering, personal and professional development; she has been reported to be a model student and a role model for other learners; and she scored the highest level of achievement of any ESOL student present or historically in Her Majesty's Prison Peterborough. Her then tutor Dr Woodbridge noted that it was rare for him to support a learner but believed she was earnest in her wish to undertake a lawful and constructive life in the future. By that stage, Ms [M] had trusted status and she has continued in detention since then and subsequently been released, as apparent from her presence today, and her children remained in the care of their grandmother under a special guardianship order.

The Proceedings before the Judge

11. The judge set out the relevant framework and summarised the respective positions. The judge held that it was common ground that the Ms [M] did not have permanent

residence and so could be deported if she represented a present and sufficiently serious threat to either public policy or security. The judge concluded that the Secretary of State's characterisation of the Ms [M]'s offending bore little relationship to the judge's findings about what had happened, by which he meant the sentencing judge's findings, and noted that the information from prison, the OASys Report and the previous good character showed that the Ms [M] could not be said to represent a threat to the fundamental interests of society. It could not be shown, forward-looking, that Ms [M] represented a sufficiently serious threat that her deportation could be justified.

No material error of law

12. The Secretary of State in written submissions and in the admirable and succinct submissions put forward by Mr Jarvis today, submitted that the judge had sought to minimise the appellant's role in the criminal matter and gone behind some of the sentencing remarks. It was said that the Judge had failed to have proper regard to the provisions of the 2016 Regulations by failing to go through the Schedule 1 considerations, which the judge was mandated to do by reason of Regulation 27(8) of the Regulations. It was submitted that the judge had come to the conclusion which was wrong in relation to the presentation of a genuine, present and sufficiently serious threat.
13. So far as the judge's assessment of the sentencing remarks, in our judgment, the Judge did not make any error in setting out the material parts of the sentencing remarks that were made by the sentencing judge. The judge was right to identify the basis on which Ms [M] was sentenced, and we have set out further information in this judgment to identify that the offending carried out by Ms [M] was serious and deserving of serious punishment, but that there were a number of mitigating features.
14. So far as the most important error made by the judge is concerned, it is necessary to set out part of the 2016 Regulations. Regulation 27, which was applicable at the time, (we should say that it has been amended in immaterial respects on 24 July 2018) provided that:
 - “(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 -
 - ...
 - (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”

and 27(8) provides that 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.).

15. Schedule 1 sets out a number of paragraphs which identify that it is for each state to set out its own policy. Paragraph 2 deals with integration. Paragraph 3 identifies that the longer the sentence, and we record that Ms [M] was given a long sentence of five years, the greater the likelihood of threat. Paragraphs 4, 5 and 6 deal with matters on which no particular reliance is placed but at paragraph 7 there is reference to the fundamental interests of society, including the maintenance of public order and the causing of harm to society and the importance of freedom to others and protecting the public.
16. It is right to acknowledge that the judge made a legal error in not referring to schedule 1 as he was required to do by regulation 27(8) of the 2016 Regulations. However in our judgment the most important material was the OASys Report and the reports from custody. This has to be taken together with what was known about Ms [M]'s role in this offending. Having looked at all that material carefully and having particular regard to the sentencing judge's finding which we have emphasised before, namely that Ms [M] had acted totally out of character, means that the judge's conclusion that the Secretary of State could not show a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is, in our judgment, right.
17. For all those reasons, we acknowledge that there was a legal error in failing to refer to paragraph 1 and paragraph 7 of Schedule 1 pursuant to Regulation 27(8) but consider it not to be material because, in our judgment, the judge was right to find the absence of the relevant threat. We conclude these remarks by thanking both representatives for their assistance.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Mr Justice Dingemans

Date 22 March 2019

Mr Justice Dingemans