Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00421/2018

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Decision & Reasons Promulgated**
On 25 February 2019	**On 11 April 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MOHAMOUD ABDO AHMED
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Skinner, Counsel instructed by Wilson Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Denmark. He was born in 1991. He appeals the decision of the First-tier Tribunal to dismiss his appeal against the decision of the Respondent to make him the subject of a deportation order.

2. It is essential that anyone seeking to understand this decision appreciates that the Appellant, as an EEA national, is subject to provisions concerning deportation that do not apply to people who are foreign nationals. They are mainly set out in the

Immigration (European Economic Area) Regulations 2016 which is Statutory Instrument number 1052 of 2016.

3. It is also important to appreciate that there are findings in this case that are not always present in similar sounding decisions. Particularly at paragraph 27 the First-tier Tribunal Judge said:

> "Because the appellant has resided in the UK for a continuous period of at least ten years the decision can only be taken on imperative grounds of public security."

4. As a statement of law this is undoubtedly wrong. A person is entitled to the protection of a decision "imperative grounds" only when (broadly) he is an EEA national who has resided in the United Kingdom for ten years and who as obtained a right of residence in the United Kingdom and whose integrative links have not been interrupted by a prison sentence. This summary is also a simplification by way of introduction but it is permissible because I do not have to decide the level of protection appropriate in this case. It was agreed before the First-tier Tribunal that the Appellant cannot be removed under the Regulations "except on imperative grounds of public security".

5. I do not wish to imply any criticism in the First-tier Tribunal Judge's finding that the appellant is entitled to this very high degree of protection. Once the necessary residence has been established there has to be an evaluative exercise considering the effect of prison. If the parties were satisfied in the light of the Regulations that the appellant was entitled to the highest degree of protection then, although the judge can take a different view, it is possibly undesirable and *potentially* unlawful for the judge to interfere. The judge must not favour either party to the appeal or assume that a concession should not be made when the person making it may be well be informed better than is the judge. The judge certainly could not have reached a different conclusion without giving notice of that intention. It is not an error of law to accept a concession of fact.

6. It must not be forgotten that in any case where an EEA national is to be deported, even if that EEA national has only the minimum level of protection, that person cannot be deported unless:

> "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;" (Regulation 27(5)(c))

7. Although the First-tier Tribunal was satisfied that both of these criteria were met and indeed that the appeal should be dismissed on human rights grounds with regard to Article 8 of the European Convention on Human Rights, it is the Appellant's case that the reasons given did not justify the decision and that the evidence before the First-tier Tribunal could not justify the decision that the Appellant was a person whose personal conduct represented the required risk or that there were imperative grounds to justify his removal.

8. It is noteworthy that the reasons given in the Decision to Make a Deportation Order dated 14 June 2018 say little or nothing about imperative grounds. Certainly the decision does not make reference to the requirements of paragraph 27(4) but matters had moved on by the time the First-tier Tribunal heard the case and an important concession was made by the Respondent before the First-tier Tribunal. However there is nothing in that letter which illuminates the decision.

9. The First-tier Tribunal noted that one of the things it had to decide was "whether the personal conduct of the appellants represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The appellant was convicted after a trial on two counts on an indictment, one alleging conspiracy to supply a controlled drug class B and another of conspiracy to supply a controlled drug of class A, particularly heroin, and another of conspiracy to supply a controlled drug of class A crack cocaine.

10. I cannot improve on the description of the appellant's criminality given by the First-tier Tribunal in the Decision and Reasons that drew heavily on the sentencing remarks of The Recorder of Worcester, His Honour Judge Juckes QC. The First-tier Tribunal Judge said:

> "35. The Appellant was the organiser of the conspiracy. He ran it. It was a commercial enterprise and a well organised business. The Appellant was a person of ability who had control of what was going on. The Appellant hired expensive cars to further the conspiracy, one of which he took from his brother. It was the Appellant who established, at least one, of two dedicated drug phonelines. 'Text shots', the modern electronic version of 'mailshots', were set out advertising drugs for sale. The enterprise was resourceful and a client base was created in a highly competitive market.
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> 36. This was a conspiracy executed over nearly five months between 01 December 2014 and 28 April 2015. The business started in Hull. The first address from which drugs were sold was shut down. That did not stop the Appellant's conduct and a second premises were established, again in Hull. That too was shut down. That too did not stop the appellant's conduct. The business then moved to Worcester where two further premises were set up. Others were arrested in Worcester. Those arrests did not deter the Appellant.
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> 37. The Appellant himself was stopped by the police once and arrested twice. Neither the stop nor the arrests deterred him. On one occasion the Appellant was arrested in possession of the drugs line which was then reactivated within a couple of hours of his release from the police station. HHJ Juckes QC described the Appellant's attitude to law enforcement as 'utterly contemptuous'."

11. The First-tier Tribunal also noted positive aspects of the Appellant's character. He was taking advantage of some of the opportunities given in prison. He was an "equalities representative" and a member of the "prison council". He was complying with his sentence plan objectives and was described as polite and respectful. He was an enhanced prisoner and had been found to be drug free.

12. He continued to deny his guilt. The judge had regard to the OASys risk assessment which assessed the appellant's risk to the community as "low" but the judge found

his failure to accept responsibility for the offence to be significant so that it undermined the relevance of his positive attitudes. He concluded that the appellant had not reformed or rehabilitated because he still denied his guilt and the judge went on to dismiss the appeal.

13. The OASys report is in the papers. It is dated 1 June 2018. He did indeed score as someone who was a low risk in the community. There was a low risk of reoffending. The judge concluded that the Appellant remains at risk. However I agree with Mr Skinner, who relied heavily on very well prepared grounds by Mr N Armstrong of Counsel, that the only explanation given for the conclusion that he remains a risk is the judge saying as he does at paragraph 40:

> "I fail to see how he can advance this positive use of his time as evidence of rehabilitation when clearly, in his mind, he has done nothing to be rehabilitated from."

14. I agree that this is indeed precisely the error identified in the case of **R v the Parole Board v Secretary of State for the Home Department Ex Parte Owen John Oyston** the Lord Chief Justice said:

> "Convicted prisoners who persistently deny commission of the offence or offences of which they have been convicted present the Parole Board with potentially very difficult decisions. Such prisoners will probably not express contrition or remorse or sympathy for any victim. They will probably not engage in programmes designed to address the causes of their offending behaviour. Since they do not admit having offended they will only undertake not to do in the future what they do not accept having done in the past. Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in future. Even in such cases, however, the task of the Parole Board is the same as in any other case: to assess the risk that the particular prisoner if released on parole, will offend again. In making this assessment the Parole Board must assume the correctness of any conviction. It can give no credence to the prisoner's denial. Such denial will always be a factor and may be a very significant factor in the Board's assessment of risk, but it will only be one factor and must be considered in the light of all other relevant factors. In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole."

15. The judge here has given no reason for rejecting the evidence that the claimant presents a low risk except his failure to admit guilt and that is not irrational conclusion but an error in law.

16. Mr Jarvis argued that the judge had reached a permissible conclusion on future risk which was informed by the appellant's lack of frankness. I do not agree. I repeat the only reason given was the failure to admit guilt and that on its own cannot be enough.

17. If this is all there was to the case then the case would have to be heard again where proper findings can be made including, if appropriate, on the appellant's own

evidence about his intentions and desires. There is some evidence to think that he no longer presents a risk.

18. However it is only necessary to decide if there is a future risk if there are imperative grounds for the Appellant's removal.

19. It was once almost judicial folklore that "imperative grounds" were reserved for issues of national security. I doubt that the law was ever expressed so simply in a serious context such as a judgment but if that was thought then it is clearly wrong. Any credence in that idea was firmly finished off in a decision of the Court of Justice of the European Union in **Land Baden-Württemberg v Tsakouridis (Case C-145/09)**.

20. That decision was before the First-tier Tribunal Judge and was relied on to support the conclusion that imperative grounds can exist in drug cases. Undoubtedly they can.

21. This is a convenient place to acknowledge in my decision the seriousness with which drug abuse has to be viewed by the criminal courts. Illicit drugs very often harm their users. Sometimes there are tragic consequences after only one dose has been taken. Sometimes the drugs are not what they purport to be and taking them leads to very serious harm. Sometimes a person becomes addicted and descends from industrious living to taking every measure including criminal measures and submission to sexual exploitation to raise the funds necessary to sustain his habit. This degree of harm impacts on society as a whole. Further the mess associated with drug dealing, such as spent needles, presents a hazard to innocent people and perhaps particularly to children who might not appreciate the dangers of what they see. Further drug suppliers often form criminal gangs to protect their illicit businesses from competition and surveillance. Each of these things can have a wide impact on society. Nothing I am saying here should be construed as any kind of approval of the drugs trade or any failure on my part to recognise just how serious it can be. It does not follow from anything I have said so far that there are "imperative grounds" in this case.

22. In **Tsakouridis** the Court decided that imperative grounds is a "concept which is considerably stricter than that of 'serious grounds'" and 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 reasons'". (Paragraph 40 to 41).

23. At paragraph 47 the court recognised the potential for drug trafficking cases to be sufficiently serious and said:

> "Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind (see, to that effect, inter alia, **Wolf v Hauptzollamt Düsseldorf Case 221/81 [1982] ECR 3681** (para 9) and **Aoulmi v France [2006] 46 EHRR 1** (para 86)), trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it."

24. For all that has been said about the seriousness of the offence this is not a case where the appellant's conduct can be said to threaten "the calm and physical security of the population as a whole or a large part of it".

25. HHJ Juckes had in mind the sentencing guidelines. Reference has already been made to his sentencing remarks. However he also said:

> "As far as the question of quantities of drugs are concerned in this case, I will deal with this on the basis that this is a category 2 case."

26. Elsewhere in his sentencing remarks Judge Juckes described "category 2" as appropriate for the quantity and periods involved and identified the range of sentences as between nine and thirteen years. He then imposed a sentence of 12 years imprisonment.

27. The sentencing guidelines were was not raised before me but the Drug Offence Definitive Guideline is a public domain document available online and this confirms that the appropriate range for a category 2 offence involving class A drugs and their supply is nine to thirteen years. In short the trial judge did not regard this as the most serious kind of drug offence. The most serious offences involving the misuse of drugs can be punished by imprisonment for life.

28. It would be too crude to suggest that imperative reasons can only exist in the case of the most serious kind of drug offences but it is important in a case such as this to keep a check on reality. Imperative grounds exist in the most serious cases. This is a serious case, which is why it was punished with twelve years' imprisonment but that is all that it is. It is not the most serious kind.

29. As explained above, the Respondent's Decision to Make a Deportation Order did not accept that there had to be "imperative grounds" and so does not explain why there are imperative grounds in this case.

30. Deplorable as the Appellant's behaviour may be, I can see no justification for concluding that it threatened "the calm and physical security of the population as a whole or a large part of it".

31. In my judgment when the requirements of imperative grounds are remembered dispassionately this is not such a case where the Applicant's deportation is imperative and the First-tier Tribunal Judge was wrong to say otherwise.

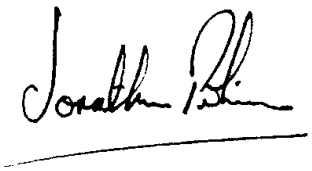
32. It follows that I find on the facts given the case cannot satisfy the imperative grounds test and therefore the appeal has to be allowed.

33. I repeat here for emphasis that this is a decision based on its own particular facts and it depends to a high degree on the Secretary of State accepting that the "imperative grounds" test applies.

34. Nevertheless, for the reasons given, the First-tier Tribunal erred in law. I set aside its decision and I substitute a decision allowing the appeal on EEA grounds.

Notice of Decision

The appeal is allowed



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 10 April 2019