Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00306/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 March 2020	**On 27 April 2020**

Before

MR JUSTICE JOHNSON
sitting as a Judge of the Upper Tribunal
UPPER TRIBUNAL JUDGE PICKUP

Between

LAUMA VANKOVA
(NO ANONYMITY DECISION MADE)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:
For the Appellant: Mr A Tan, Senior Home Office Presenting Officer
For the Respondent: Mr A Bandegani, instructed by Freemans Solicitors

DECISION AND REASONS

1. Both judges have contributed to this decision.

2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Bristow that the removal of Ms Vankova from the United Kingdom would breach her rights under the EU Treaties because it would not be in her children's best interests. As a

result, Judge Bristow allowed Ms Vankova's appeal against the Secretary of State's decision that she should be deported.

The facts

3. Ms Vankova is a national of Latvia. She is 31. She has twin boys who are 15 and who speak English and some Latvian. The family moved to the UK in 2008 when the twins were almost 4. Between 2010 and 2013 Ms Vankova conspired to breach United Kingdom immigration law and to acquire, use or possess criminal property. She was convicted of those offences and was sentenced to a total sentence of 6 years' imprisonment. In his sentencing remarks in May 2016, the Judge (having described how Ms Vankova's co-defendants were purporting to help find work for poorly paid workers) said:

> "You set up a plan together to recruit some of your most vulnerable female workers as brides for hire and to introduce them to a wider conspiracy that was in contact with people desperate to come to this country. One woman who owed you money was threatened with violence if she didn't go through with a wedding… There is something careful and calculated in the way you exploited vulnerable people who worked for you…
>
> … You started with bank accounts set up with a view to defraud. You facilitated multiple account openings, perhaps with the co-operation of some nominees… [These accounts] were used to receive criminal money…"

4. Ms Vankova's mother, Mrs Vankova, is 51. She has lived in the UK since 2012. When Ms Vankova was sent to prison, her children went to live with Mrs Vankova, with whom they have a close relationship. They are now once again living with Ms Vankova who has been released from custody on licence.

5. On 9 May 2019 the Secretary of State wrote to Ms Vankova and gave reasons for a decision that her deportation was justified on grounds of public policy in accordance with regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 and that it was proportionate to deport her in accordance with the principles of regulations 27(5) and (6).

6. Ms Vankova appealed against that decision on the ground that the decision breached her rights under the EU Treaties in respect of residence in the UK. She initially contended that the decision was also incompatible with Article 8 of the European Convention on Human Rights, but in the event she did not pursue that aspect of her appeal.

Legal framework

7. Mr Vankova is a citizen of an EEA country. She has resided in the United Kingdom for a continuous period of five years. She has therefore acquired a right of permanent residence in the UK – see regulation 15 of the 2016 Regulations. Regulation 23(6)(b) permits the Secretary of State to restrict a right of permanent residence and to remove a EEA national from the UK on "serious grounds of public policy and public

security". Any such decision must be taken in accordance with regulation 27. That states:

> "**27 Decisions taken on grounds of public policy, public security and public health**
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> (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> …
>
> (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.
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> …
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> (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—
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> (a) the decision must comply with the principle of proportionality;
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> …
>
> (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;
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> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
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> …
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> (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.).

8. Paragraph 7 of schedule 1 to the Regulations states that the fundamental interests of society (cf regulation 27(5)(c)) include:

> "(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system….
>
> …

(f) excluding or removing an EEA national or family member of an EEA national with a conviction… and maintaining public confidence in the ability of the relevant authorities to take such action;

…

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

…"

The decision of the First-tier Tribunal

9. The First-tier Tribunal Judge made a number of findings relevant to the application of the Regulations:

(a) Ms Vankova's conduct engaged the fundamental interests of society, including preventing unlawful immigration and abuse of immigration laws, and maintaining the integrity and effectiveness of the immigration control system; removing an EEA national with a conviction; maintaining public confidence in the ability of the relevant authorities to take such action; 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 crime with a cross-border dimension; protecting the rights and freedoms of others, particularly from exploitation and trafficking; and protecting the public).

(b) Ms Vankova's assertion that she pleaded guilty at the first available opportunity was entirely rejected. She had not accepted full responsibility for her behaviour.

(c) Ms Vankova presented a medium risk to the public of serious harm "via emotional and psychological harm" and a medium risk to known adults of serious harm. She has, however, been assessed as presenting a low risk of re-offending.

(d) Ms Vankova had not successfully reformed or rehabilitated.

10. In the light of these findings Judge Bristow did not consider that removal would have a disproportionate effect on Ms Vankova. He pointed out that there was no question of Ms Vankova's children being forcibly removed from the United Kingdom – that would be a matter of choice. He then said:

> "I accept that it would be something of a compelled choice however in circumstances where the Appellant wishes that [her children] live with her and

> when the Respondent accepts that it would be unduly harsh on them to remain in the UK without her. Mr Simon Dermody states that "forced relocation" would be "nothing short of a developmental catastrophe for both boys"… I have found that force of circumstances would mean [the children] would go with the Appellant to Latvia if she were removed. I accept, in those circumstances, Mr Simon Dermody's opinion that relocation would be a developmental catastrophe for [them].
>
> I find that it would not be in [the children's] best interests to relocate to Latvia with the Appellant. It is not in their best interests to leave the UK at this time. It is in their best interests to live with the Appellant and to live in the UK. This can only be achieved if the Appellant lives with [them] in the UK.
>
> The removal of the Appellant would be contrary to [the children's] best interests. Consequently, the decision would have a disproportionate effect on them. For that reason, the decision does not comply with the principle of proportionality as is required by the 2016 Regulations.
>
> The decision breaches the Appellant's rights under the EU Treaties in respect of entry to or residence in the UK."

The Secretary of State's appeal

11. The Secretary of State appeals on the ground that there are inadequate reasons for the finding that the deportation of Ms Vankova to Latvia would not be proportionate and that the Judge failed to consider material matters, particularly the public interest in deportation. The First-tier Tribunal granted permission to appeal, stating:

> "It is arguable that the Judge has failed to consider the public interest in deportation when assessing proportionality. The relevant finding is at [54] of the Judge's decision and it is apparent from this paragraph that the finding is made as a consequence of the Judge's view that removal of the appellant would not be in the best interests of her children. It is arguable that there is nothing in this paragraph or those preceding it to show that the Judge has conducted the balancing exercise necessary before determining proportionality. Alternatively, it is arguable that the Judge has given inadequate reasons to enable the losing party to understand why he has resolved this balancing exercise in the appellant's favour."

12. We heard oral argument from Mr Tan on behalf of the Secretary of State and Mr Bandegani on behalf of Ms Vankova. We are grateful to both for their oral and written submissions.

13. Neither party had addressed the principle of proportionality under the EEA regulations in their submissions. We granted permission for further written submissions on the topic. Mr Bandegani provided helpful further written submissions which we have taken into account. Despite granting an extension of time to 27.3.20 for the Secretary of State to lodge further submissions, no such further submissions had been received by the date of the making of this decision.

The principle of proportionality under the EEA Regulations

14. Regulation 27(3) prevents the removal of an EEA national with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security. If that test is not met then the person may not be removed. There is, at that stage, no proportionality assessment. It is only if there are serious grounds of public policy and public security that it is then necessary to address the additional requirements imposed by regulation 27(5): "it must also be taken in accordance with the following principles", and see MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC) at [29b]. The first of those additional requirements is that the decision must comply with the "principle of proportionality" – see regulation 27(5)(a).

15. The "principle of proportionality" to which reference is made in regulation 27(5)(a) is taken from Article 27(2) of the Freedom of Movement Directive. It derives from a general principle of EU law that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" – see article 5(4) of the Treaty on European Union. That principle is separate from the test of proportionality under the European Convention on Human Rights, as distilled in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39; [2014] AC 700 *per* Lord Reed JSC at [74]. The principle of proportionality under EU law requires consideration of two questions – see R v Lumsdon v Legal Services Board [2015] UKSC 41; [2016] AC 697 *per* Lord Reed and Lord Toulson JJSC at [33]:

> "… first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method."

16. The approach to be taken in assessing whether removing a fundamental freedom under the Treaties accords with the principle of proportionality was explained thus by Lord Toulson at [55]-[56]:

> "55. …the court must determine whether the measure is suitable to achieve the legitimate aim in question, and must then determine whether it is no more onerous than is required to achieve that aim, if there is a choice of equally effective measures. The position was summarised by Advocate-General Sharpston at para 89 of her opinion in Commission of the European Communities v Kingdom of Spain (Case C-400/08) [2011] ECR I-1915, a case concerned with the right of establishment:
>
> > 'Whilst it is true that a member state seeking to justify a restriction on a fundamental Treaty freedom must establish both its appropriateness and its proportionality, that cannot mean, as regards appropriateness, that the member state must establish that the restriction is the most appropriate of all possible measures to ensure achievement of the aim pursued, but simply that it is not inappropriate for that purpose. As regards proportionality, however, it is necessary to establish that no other measures could have been equally effective but less restrictive of the freedom in question.'
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> 56. The justification for the restriction tends to be examined in detail, although much may depend upon the nature of the justification, and the extent to which it

> requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense…"

17. Thus, the principle of proportionality under the Treaties does not in all circumstances incorporate the proportionality balance that is the fourth of the Bank Mellat criteria – namely whether "balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

18. However, in this particular context the Court of Justice of the European Union has treated the principle of proportionality under EU law in a similar way as the test for proportionality under Article 8 of the European Convention on Human Rights – see Orfanopoulos and others v Land Baden-Würtenberg C482/01 [2005] 1 CMLR 18 at [95]-[99]:

> "95. … the examination on a case-by-case basis by the national authorities of whether there is personal conduct constituting a present threat to the requirements of public policy and, if necessary, of where lies the fair balance between the legitimate interests in issue must be made in compliance with the general principles of Community law.
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> 96. It is for the competent national authority to take into account, in its assessment of where lies the fair balance between the legitimate interests in issue, the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons…
>
> 97. Moreover, it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the freedom of movement for workers only if the measure in question takes account of such rights…
>
> 98. It must be noted, in that context, that the importance of ensuring the protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is clear that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights, which, according to the Court's settled case-law, are protected in Community law…
>
> 99. Finally, the necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned (see, as regards Article 8 of the ECHR, Boultif v Switzerland (54273/00) [2001] ECHR 493, paragraph 48)."

19. Aside from complying with the principle of proportionality, a regulation 27 decision may only be made after having regard to the other factors set out in regulation 27(5) and (6). These include, on the one hand, the question of whether the person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and, on the other hand, considerations such as the family of the person. Although expressed in the Regulation as separate requirements, the Upper Tribunal has held that they fall for assessment when addressing the principle of proportionality – MC at [29b] and [29f]. What is required, both under the Directive and the 2016 Regulations is a "wide-ranging holistic assessment" – see MC at [29j].

20. It is, moreover, necessary for a decision maker, as a primary consideration, to take account of the best interests of any child – see ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166 *per* Lady Hale JSC at [24]. It is now well established what this means in practise. It does not mean that the bests interests of a child should be the sole or necessarily decisive consideration. Rather, it means that "they must be considered first" albeit they could then "be outweighed by the cumulative effect of other considerations" – see ZH *per* Lady Hale at [33].

Discussion and decision

21. The First-tier Tribunal sought to address the question of whether the removal of Ms Vankova was compatible with the principle of proportionality. It did not, however, answer that question by reference to the two questions identified in Lumsdon, namely whether her removal was suitable or appropriate to achieve the objective pursued, and whether it was necessary to achieve that objective or whether the objective could be achieved by a less onerous method. If it had done so then it would have been bound, on the findings it made, to resolve those questions in the Secretary of State's favour.

22. The objective that was here being pursued by the Secretary of State was the prevention of unlawful immigration and abuse of the immigration laws, and the maintenance of the integrity and effectiveness of the immigration control system. The First-tier Tribunal's finding that Ms Vankova's "personal conduct represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society" and that she was not reformed or rehabilitated inevitably meant that her removal was suitable or appropriate to pursue the objective pursued and that it was necessary to remove her to achieve that objective – it could not be achieved by a less onerous method.

23. So, in that narrow sense, the Secretary of State's decision did not offend the principle of proportionality.

24. As explained above, however, that is not an end to the analysis that is required. It is necessary to undertake a "wide-ranging holistic assessment" of the factors identified in regulation 27, and to have regard, as a primary consideration, to the best interests of Ms Vankova's children. This includes assessing whether a fair balance has been struck in seeking to protect public policy, having regard to all relevant factors

including on the one hand the nature and seriousness of the criminal offences, and on the other, the difficulties that the children would risk in their country of origin.

25. The First-tier Tribunal concluded that her children's bests interests were to remain with Ms Vankova in the United Kingdom. It allowed the appeal on this basis.

26. Even if the finding that Ms Vankova's children's best interests were to remain with her in the United Kingdom were sound, this was not a sufficient basis to allow the appeal. Although their interests were a primary consideration, they were not the sole consideration. The First-tier Tribunal proceeded on the basis that once it had been found that the children's best interests lay in remaining with their mother in the United Kingdom, the decision to remove Ms Vankova was necessarily incompatible with the EEA Regulations. That amounted to an error of law.

27. For that reason alone, we find that the First-tier Tribunal made an error of law which requires the decision in the appeal to be set aside and remade.

28. In remaking the decision, we do not question the conclusion that it would be in the children's best interests, assessed in isolation and without regard to the "real world" situation of Ms Vankova, to remain in the United Kingdom with their mother. The Secretary of State had also conceded that it would be unduly harsh for the children to remain in the United Kingdom without their mother. Although they had been dislocated from their mother whilst she was in custody they are now back in her immediate care. So far as moving to Latvia is concerned, they have spent their formative years in the UK. They were, at the time of the First-tier Tribunal hearing, at a critical stage of their education.

29. However, given that the bests interests of the children are not the sole consideration, it is not sufficient to make a binary assessment as to where the children's best interests lie. It is necessary to consider whether it is reasonable to expect the children to live in Latvia (see ZH at [29], and EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 *per* Lewison LJ at [57]) and to consider the impact on the children of different options so that they can be weighed in the balance. Here, those options included moving to Latvia with their mother, or remaining with their grandmother in the UK, or some alternative approach (for example completing their GCSEs in the UK before moving to Latvia, or spending term-time with their grandmother and holidays with their mother). Moreover, it is necessary to conduct that analysis "on the basis that the facts are as they are in the real world" – see EV at [58], and KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; [2018] 1 WLR 5273 *per* Lord Carnwath JSC at [19]. We have taken all of these factors into account in the remaking of Ms Vankova's appeal.

Disposal

30. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or that the appeal is redetermined by the Upper Tribunal.

31. We, therefore, considered whether to redetermine the appeal without a further hearing. Mr Bandagani argued that we should not do so, submitting that substantial further fact-finding was required. In particular, it was said that Ms Vankova has become aware of a programme recently broadcast on Latvian television about her offending in the United Kingdom which, it was submitted, may have a bearing on the determination of the appeal. Moreover, both parties made concessions at the previous hearing that they may have wished to reconsider: the Secretary of State as to the children's best interests, and Ms Vankova as to whether she in fact had 10 years continuous residence in the United Kingdom (such that any decision to remove her could only be taken on "imperative grounds of public security").

32. We do not consider that either of these points justifies the remittal of the appeal or a further hearing before our remaking of the decision, particularly when these were not issues raised in the grounds of appeal to the Upper Tribunal. If Ms Vankova considers that the television programme puts her at risk then her remedy is to make representations to the Secretary of State and invite her to treat these as a fresh claim pursuant to paragraph 353 of the Immigration Rules. As to the parties' respective concessions, neither party has sought to withdraw a concession previously made nor given any reason as to why they should be permitted to do so.

33. Accordingly, we have considered for ourselves whether the Secretary of State's decision should be upheld. We do so on the basis of the primary findings of fact made by Judge Bristow identified in paragraph 9 above, taken together with Judge Bristow's finding that it is in the children's best interests to live with their mother and to live in the UK.

34. The offence committed by Ms Vankova struck at the heart of effective immigration control and the protection of the vulnerable. There is a very strong public interest in her removal from the United Kingdom. There is, as Judge Bristow observed, no question of her children being forcibly removed. It will be a family choice as to whether they remain with their grandmother in the United Kingdom, or move with their mother to Latvia, or spend time between the United Kingdom and Latvia. None of those options would secure their ultimate best interests of remaining in the United Kingdom with their mother. It is simply not possible to secure both the public interest in removing Ms Vankova from the United Kingdom and her children's best interests of living with her in the United Kingdom. It is, however, not unreasonable to expect the children to live with her in Latvia if that is what the family choose to do. They speak some Latvian, that is where they born and spent their early years, and they have now effectively completed their GCSE courses. The element of choice, control and ability to return to the United Kingdom mitigates the developmental catastrophe that would be occasioned by a wholly forced removed. Insofar as there is any developmental impact, that is of Ms Vankova's making and is not such as to render it unreasonable for them to return to Latvia if that is what they chose to do.

35. Accordingly, whilst recognising that this departs from a primary consideration, namely the best interests of the children, a holistic assessment of the competing considerations outlined above, including those factors preserved from the decision of

the First-tier Tribunal, falls clearly in favour of upholding the Secretary of State's decision: that primary consideration is "outweighed by the cumulative effect of other considerations", particularly the strong public interest in removing Ms Vankova from the United Kingdom.

Outcome

36. The First-tier Tribunal erred in law in concluding that the decision of the Secretary of State to deport Ms Vankova breached the principle of proportionality. Its error was to treat the bests interests of her children as the sole consideration, without undertaking a holistic assessment that encompassed other relevant factors.

37. Accordingly, the Secretary of State's appeal is allowed, the First-tier Tribunal's decision is quashed, and the Secretary of State's decision is restored.

Notice of Decision

38. The Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside, and we remake the decision in the respondent's appeal by dismissing it.

Anonymity

39. We have considered whether Ms Vankova requires the protection of an anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. We are told that a programme about Ms Vankova has been broadcast in Latvia, without affording her anonymity.

40. Given the circumstances, we make no anonymity order.

Signed *J. Johnson* Date 30 March 2020

Mr Justice Johnson, sitting as an Upper Tribunal Judge