Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00602/2018 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st October 2020	**On 2nd November 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR REUBEN MIRANDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the respondent: *Ms E Griffiths*, instructed by Turpin & Miller LLP Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 21st October 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and

I was satisfied that the representatives were able to participate in the hearing. I was helped by the representatives' relevant and clear submissions.

3. The Secretary of State was the respondent before the First-tier Tribunal, while Mr Miranda claimed a right to remain and resisted his deportation to his country of origin, Portugal, on the basis of his rights as an EU citizen. To avoid confusion, I will refer to the Secretary of State by that name and Mr Miranda as the Claimant in this appeal.

4. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Colvin (the 'FtT'), promulgated on 3rd March 2020, by which she allowed the Claimant's appeal under the Immigration (EEA) Regulations 2016, on the basis that the Claimant could only be removed on 'imperative grounds' of public security, and it had not been shown that were such imperative grounds; that the Secretary of State had not shown that the Claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; and the Secretary of State had failed to engage in the Claimant's circumstances when assessing the proportionality of his deportation under regulation 27 of the Regulations, noting that he had come to the UK aged four and had lived here for 23 years.

5. As recorded by the FtT in her decision, the Secretary of State issued a deportation order in respect of the Claimant on 18th September 2018, which she reconfirmed in a supplemental letter dated 24th January 2019, following the Claimant's repeated criminal offending. He had entered the UK in 1997, aged four, with his mother and sibling. His recorded offending began when he received a police caution for fare evasion in 2009. He then received a series of non-custodial sentences between 2010 to 2014, for offences ranging from attempted robbery to possession of class B drugs (cannabis). The seriousness of his offending then escalated, with sentences of imprisonment, the longest being 45 months, for conspiracy to supply class A drugs (heroin and crack-cocaine), for which he was convicted on 12th February 2016. Having been served with notice of liability to deportation on 24th May 2016; he was served with the deportation order on 18th September 2018; appealed to the First-tier Tribunal on 28th September 2018; a hearing to consider his appeal on 29th October 2018 was adjourned, pending further evidence; he was released from prison in December 2018, only to be rearrested in February 2019; and then prosecuted and sentenced in July 2019 to five years' imprisonment for possession with intent to supply crack-cocaine.

The FtT's decision

6. The FtT found that the Claimant had enhanced rights (i.e. there had to be 'imperative grounds') of protection under the Regulations (this had initially been disputed by the Secretary of State), having acquired the right of permanent residence, with continuous residence in the UK for over 10 years (§[28]), without a break in integrative links in the UK and he had a British national partner and son, aged 3. The FtT considered the well-known authority of Land Baden-Württemberg v Tsakouridis (Directive 2004/38/EC) Case C-145/09. Analysing the Claimant's criminal history at

(§[38] to [41]), the FtT did not accept that the risk posed by the Claimant was so compelling that it overrode the Claimant's enhanced protection, when considered by reference to the case of VP (Italy) v SSHD [2010] EWCA Civ 806. It had also not been shown that the Claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in the absence of sentencing remarks and an OASys report in respect of the Claimant's most recent offending (§[40] and [41]). Finally, the FtT concluded that the Claimant's deportation would not be proportionate, noting the period of time spent by him in the UK; his continuing integrative links and the greater chances of rehabilitation in the UK rather than Portugal, as all of his remaining family were in the UK.

7. Having considered the evidence as a whole, the FtT allowed the Claimant's appeal.

The grounds of appeal and grant of permission

8. The Secretary of State lodged grounds of appeal which essentially assert that the FtT had failed to adequately explain why the Secretary of State had not shown imperative grounds requiring the Claimant's deportation, given his repeat offending and the serious threat that he posed to the public. The FtT had failed to analyse sufficiently the risk of the Claimant's reoffending and had erred in speculating that he might not reoffend, in the absence of an up-to-date OASys report, while ignoring the Claimant's rapid re-offending, even after he was the subject of a deportation order.

9. First-tier Tribunal Judge Kelly initially refused permission, but on renewal, permission was granted by Upper Tribunal Judge Allen on 12th May 2020, for the reasons set out in the grounds.

The hearing before me

The Secretary of State's submissions

10. In terms of the Secretary of State's submissions, what was said was that the FtT had identified the Claimant as presenting a public risk; he had reoffended on recent release from prison virtually straightaway, but the FtT's analysis at §[41] was flawed. In particular, the FtT had referred to the assessment of risk in the OASys report, which clearly was wrong, as the Claimant then went on to reoffend. It almost appeared that the FtT was providing an excuse for criminality at §[41] of her decision, suggesting that the reason for the appellant's subsequent reoffending was because he owed a debt to a drug gang. Those committing criminal offences frequently had an excuse for offending, and the FtT's consideration of the excuse and speculation as to subsequent reoffending because of that excuse was an error of law. By analogy with the well-known authority of Binbuga (Turkey) v SSHD [2019] EWCA Civ 551, there could be no credit for being a member of a criminal gang.

11. When I explored with Mr McVeety about the analysis by the FtT at §[40] as to whether it was said, noting Tsakouridis, that the Claimant's offending was of such magnitude so as to outweigh the Claimant's enhanced protection, Mr McVeety

candidly accepted that the Claimant was a '*low-level dealer*' and it was more the Claimant's persistence, in particular the fact that he had reoffended in a matter of eight weeks after his release from prison, that made his deportation proportionate.

The Claimant's submissions

12. Ms Griffiths first of all relied upon a written skeleton argument that she had provided to this Tribunal dated 20th October 2020, which I have taken into account, but for the sake of brevity do not repeat in detail in these submissions. She referred to the cases of Tsakouridis and VP Italy, which had been correctly applied by the FtT. In essence, the FtT's obligation was to explain its conclusions in a way that the parties could see why they had won or lost. What the FtT was not required to do was to decide an argument never made before it, a point that she elaborated upon in her oral submissions. In this case, the FtT had given two key, clear reasons for her decision, acknowledging the seriousness of the offences at §[40]. First, the FtT had explained that in order to meet the higher threshold of imperative grounds, there had to be something more, and the Secretary of State had simply not shown that there was. In the absence of any positive case to the contrary, the FtT could not be criticised for failing to explain further and there was no error in that approach. The Secretary of State had not argued before the FtT that the Claimant's offending outweighed his 'imperative grounds' protection.

13. Second, the FtT's conclusion that the Claimant did not pose a genuine, present and sufficiently serious threat affecting a fundamental interest of society was plainly open to her and critically in this appeal to the Upper Tribunal, there was no allegation of perversity by the FtT. The FtT was entitled to take into account the OASys report which predated the Claimant's most recent offending and to analyse the Claimant's explanation (not justification) for subsequent offending in that context. It was never argued before the FtT that she could not take into account the OASys report and once again, this was a criticism that was now being made, which was never argued before the FtT at the time. The OASys assessment had never suggested that there was no risk of reoffending, so an assertion that the risk assessment was wrong in light of subsequent offending was not a justifiable criticism. Any asserted error in relation to this second limb was not, in any event, material, bearing in mind the first limb, which the Secretary of State had failed to meet. Finally, the FtT's assessment of proportionality was also clearly explained and her findings were open to her.

Discussion and conclusions

14. I accept the force of the submissions by Ms Griffiths, who had represented the Claimant before the FtT, that the Secretary of State had not sought to argue before the FtT that the 'imperative grounds' test had been met by the Secretary of State. Instead, the Secretary of State had challenged whether the Claimant was entitled to 'imperative grounds' protection, on the basis that she did not accept his continuous residence in the UK for a sufficient period of time. That argument had been rejected by the FtT, and the FtT's decision on that issue has not been appealed. In those

circumstances, I accept Ms Griffiths's submission that the FtT cannot be criticised for failing to analyse any argument by the Secretary of State to the contrary that there imperative grounds, when there was no argument before her that there were. Moreover, the FtT had nevertheless provided a clear and concise analysis for why there were not imperative grounds, beginning at §[40]:

> *"40. In reaching my conclusion I fully accept the very serious nature of the appellant's criminal history particularly since 2015 which shows his repeated involvement in supplying Class A drugs and I do not in any way underestimate those offences or their effect on society. However I am not satisfied on the balance of probabilities that it has been shown that it is justified to expel the appellant on imperative grounds of public security. This is for two main reasons. First, I do find that it has been shown that the appellant is a threat to public security when taking account of the cases referred to above that attempt to define the concept and give examples of the sort of conduct that might probably for within this high threshold. In particular I have taken account of the case of (VP Italy) in which the Court of Appeal held that imperative grounds of public security require not simply a serious matter of public policy but in actual risk to public security so compelling that it justifies an exceptional course of removing someone who was integrated by many years' residence in the [lost] [sic] state. While the severity of the offence or offences could be a starting point for consideration of expulsion - as they are clearly in this case - there has to be something more to justify the conclusion that removal is imperative to the interests of public security. I do not find that the respondent has shown this on the evidence before me in this case.*
>
> *"41. Second, in the absence of the Judge's sentencing remarks for the last conviction in July 2019 and an updated OASys by having difficulty reaching a decision as to whether it has been shown that the appellant is "a genuine, present and sufficiently serious threat to a fundamental interest of society." The assessment risk before me is that of medium risk to harm to the public and a low risk of reoffending. This was the view taken by the offender manager in 2018 before he was released in December of that year. It therefore does not take account of the fact that the appellant committed a further Class A drugs offence within weeks of his release in February 2019. Whilst this recent offence strongly suggests that the appellant has not been rehabilitated despite the courses completed, it may not necessarily alter the assessment risks referred to above if the circumstances of the offence put forward by the appellant – namely, that it was a one-off offence to repay a debt to a gang - are accepted. In these circumstances I find that it has not been shown that the appellant is such a genuine, present and sufficiently serious threat as to meet this criteria on public policy grounds."*

15. As can be seen at §[40], the FtT explained that while there had been offending of a very serious nature and it had been shown that the appellant was a threat to security, taking into account the case of VP (Italy), which was discussed in further detail at §[32], the severity of the offences were not such as to justify 'imperative grounds'. There is nothing inexplicable in the FtT's reasoning and it discloses no error of law. The FtT had considered and applied the correct law and given a reason for her conclusions. There was no contrary argument by the Secretary of State. I agree with Ms Griffiths's submission that the Secretary of State's lack of an argument before the

FtT that imperative grounds were met is fatal to this appeal, when the burden is on her.

16. In any event and for completeness, I went on to consider the analysis at §[41]. I do not accept Mr McVeety's submission that the FtT was effectively seeking to justify the Claimant's. The analysis can only be fairly read as a consideration of the OASys report in the context of the subsequent reoffending by the Claimant. Notwithstanding the most recent offending, the FtT was not satisfied that the Secretary of State had shown that the Claimant's conduct represented a genuine, present and sufficiently serious threat. The FtT's analysis did not, in my view, amount to impermissible speculation and I accept Ms Griffiths' submission that had she wished to do so, it remained open to the Secretary of State to have adduced a more recent analysis of risks posed by the Claimant.

17. I further accept Ms Griffiths's submission that in any event, had the FtT fallen into an error of speculation, there is no challenge to the FtT's assessment of proportionality at §[42] to [43] which, once again, the Secretary of State would have to satisfy (and the FtT found that she did not, at §[44]) in order to justify the Claimant's deportation.

18. In the circumstances, I conclude that the FtT's decision contains no error of law and I uphold her decision. The Secretary of State's appeal fails and is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed *J Keith* Date: 28th October 2020

Upper Tribunal Judge Keith