



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02866/2019 (V)**

THE IMMIGRATION ACTS

**Heard at a remote hearing via Skype
On 18 March 2021** **Decision & Reasons Promulgated
On 29 March 2021**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**FD
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Shaw, Counsel

For the respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant, FD.

Introduction

1. This is a 're-making' decision following a resumed hearing. In an 'error of law' decision dated 28 January 2020, Upper Tribunal ('UT') Judge Coker gave reasons why the First-tier Tribunal ('FTT') made an error of law in allowing FD's appeal pursuant to the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations'), such that the decision must be remade. Although the SSHD appealed against this decision to the UT, FD is now once again the appellant and I shall refer to her as such.
2. The appellant, a dual citizen of Portugal and Brazil, and therefore an EEA citizen, appealed against a decision dated 29 May 2019, in which the SSHD refused to admit her (when she was returning to the UK after a visit to Portugal) and revoked her registration certificate on grounds of public policy ('the 2019 decision'). This was based upon the appellant having become subject to a Slavery and Trafficking Risk Order ('STRO') valid from 1 November 2018 to 31 October 2020. This was granted by Norfolk Magistrates Court while the police carried out their investigations. The SSHD contended that the appellant was a person "concerned with the trafficking and exploitation of others" and that this demonstrated "a present and sufficiently serious threat" to the United Kingdom ('UK') supportive of "preventative grounds".

Background

3. The appellant was issued with an EEA registration certificate on 9 October 2017 when she was working as a cleaner at a gym. At the time she was residing with her British citizen husband, who she married in 2016, and her son, a Brazilian citizen, from a previous relationship. I shall refer to the appellant's husband as H. On 1 November 2018 the appellant was issued with a STRO at Norwich Magistrates Court, valid until 31 October 2020. This prohibited the appellant from, *inter alia*: arranging or facilitating transport, travel, work or accommodation for any persons other than family members; possessing identity or travel documentation for anyone other than herself or immediate family members; advertising for, recruiting or employing staff; advertising for services on 'vivastreet' or 'adultwork' or any similar website; using a mobile device in particular ways. The STRO was upheld by Norwich Crown Court on 22 February 2019.
4. Following this, the appellant returned to Portugal to visit her elderly parents but was refused re-entry to the UK on 29 May 2019, for reasons set out in the SSHD's decision of that date, as summarised above. The appellant was granted bail and admitted on temporary admission with reporting restrictions. She voluntarily departed to

Portugal on 29 June 2019. It is noted in a 'HO minute sheet' dated 25 June 2019 that the appellant's mother was very ill at the time and the appellant wished to visit her in Portugal.

5. The appellant was charged with human trafficking and controlling prostitution for gain for a period covering 1 May 2017 to 31 August 2018. Her first appearance following charge was at York Magistrates Court on 13 August 2020. The exact date that she was charged is not known but it is undisputed that this took place in around the summer of 2020.

Hearing

6. In accordance with directions I gave at a hearing on 2 December 2020 adjourning the matter, both parties submitted and relied upon updated bundles of evidence and skeleton arguments.
7. At the beginning of the hearing the representatives confirmed that the applicable law was not in dispute. In particular, the question for me to determine is whether the SSHD was entitled to rely upon the 2019 decision refusing to admit the appellant as an EEA citizen pursuant to the EEA Regulations. Both representatives agreed that the appellant could give her evidence via video link from Portugal.
8. Ms Shaw requested an anonymity order on the basis that this decision might be a 'reported decision' and the appellant has a criminal trial pending. I declined to make an anonymity direction at the hearing. Upon reflection, I have decided that an anonymity direction is appropriate because Ms Shaw has submitted that the appellant herself may be a victim of trafficking (see [31] below). In addition, out of an abundance of caution anonymity may also serve to prevent anything that is said in this decision, which will be publicly available, from inadvertently prejudicing the pending criminal proceedings. This can be reviewed upon completion of the criminal trial.
9. The appellant confirmed the truth of her witness statement dated 16 December 2020. She accepted that she has worked as an escort alongside other women, but denied that she was involved in any form of trafficking of others. She confirmed that she had pleaded not guilty and intended to maintain her innocence at her criminal trial due to begin in the UK in November 2021.
10. H confirmed the truth of his witness statement dated 16 December 2020. He described the challenges that he had faced over recent years and more recently, and the assistance that the appellant has given him over this time.

11. Mr Bates relied upon the respondent's Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015, dated April 2017 ('the STRO guidance') in support of his submission that at both the date of decision and the date of the hearing, the 2019 decision was open to the SSHD. Ms Shaw relied upon her detailed skeleton argument and invited me to find that the appeal should be allowed. I address the submissions in more detail below. After hearing from the representatives, I reserved my decision which I now provide with reasons.

Legal framework

12. The applicable law, set out in the EEA Regulations, was not a matter of dispute between the parties. The appellant is an EEA national and the lawfulness of the 2019 decision to refuse her admission and revoke her registration certificate is to be determined by reference to the EEA Regulations. Regulation 11(1) provides that an EEA national must be admitted to the UK subject to regulation 23(1), which provides that a refusal to admit a person may be justified on grounds of public policy in accordance with regulation 27. Regulation 27 sets out various criteria which apply to decisions taken on grounds of public policy, public security and public health, including at ss (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—

- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (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;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person's previous criminal convictions do not in themselves justify the decision;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person."

13. When read together, regulations 11, 23 and 27 thus require a proportionality exercise, i.e. an assessment of whether the adverse impact to an EEA citizen is proportionate when compared with the adverse impact to the public interest that her being admitted and / or remaining in the UK would have with regard to public policy,

public security and public health. I must also have regard to the considerations set out in Schedule 1 of the EEA Regulations, and I have done so.

14. The appellant has a right of appeal against the decision to refuse to admit her. By virtue of regulation 36(10), the provisions in the Nationality Immigration and Asylum Act 2002 ('the 2002 Act') referred to in Schedule 2 to the EEA Regulations have effect in any appeal under the EEA Regulations. This means that an appeal under the EEA Regulations is treated as "if it were" an appeal against a decision under s. 82(1) of the 2002 Act. S. 85(4) of the 2002 Act states that "on an appeal under section 82(1)...against a decision the Tribunal may consider...any matter which it thinks relevant to the substance of the decision, including...a matter arising after the date of the decision."
15. The parties agreed that I must consider all matters relevant to the substance of the 2019 decision including matters arising after the date of the decision. Mr Bates specifically agreed that in assessing the proportionality of the decision I could take into account the factual matrix since the 2019 decision including the decision to prosecute and the fact of the pending trial in November 2021. He invited me to find that the 2019 decision was proportionate at the time it was made and as at the date of hearing. Mr Bates also agreed that this is not a case in which the appellant sought to raise any new matter.

Findings of fact

16. I am satisfied that both the appellant and H gave honest evidence that has been consistent and straightforward over time. They have provided evidence, which I accept, that demonstrates that they married in 2016 and have been living together since this time, albeit the appellant has also spent considerable time in Portugal looking after her parents. H has been working in a well-paid job as an engineer for a lengthy period. H was very open and emotional about the difficulties he has faced over and above matters relevant to the appellant's STRO and criminal proceedings. He was measured and did not exaggerate the extent of his difficulties, but it is clear that he has been suffering mentally, emotionally and physically for many years and has depended upon the support provided by the appellant. As he put it: "she helped me a massive amount. I would not be here without her." These difficulties include the suicide of his first wife, juggling his fragile emotional health with a full-time and demanding job and caring for his elderly parents.
17. Mr Bates invited me to find that there was little medical evidence to support the claims of the appellant and H. However, significantly, the witnesses' evidence was consistent with each other not just

before me but over time. Although Mr Bates was correct to point out that the appellant did not provide any documentary evidence of her caring responsibilities, I am prepared to accept her evidence that she returned to Portugal to care for her parents and has been supportive of her husband during his own health concerns. This is supported by the appellant's own evidence together with H's evidence. I therefore accept that the appellant's mother has Alzheimer's disease. I accept that the appellant has spent time between Portugal and the UK for reasons relating to caring responsibilities toward her parents, at a time when she was entitled to remain in the UK (on bail) pending the outcome of these proceedings. I entirely accept the straightforward account that both witnesses provided regarding the caring responsibilities they have with their respective parents and that they wish to spend more time with each other but have been unable to do so for reasons relating to this, together with the pandemic. Prior to the pandemic, H joined the appellant in Portugal at times when his work commitments enabled him to do so.

18. I note the appellant refused to engage with the opportunity of an interview offered by the SSHD on 29 May 2019 but accept her evidence that this was upon the advice of her criminal solicitors at the time. However since the imposition of the STRO the appellant has been entirely compliant with the restrictions imposed by the STRO, bail conditions and by the SSHD. She has demonstrated respect for the criminal process, immigration laws and the immigration proceedings. Other than the matters that gave rise to the STRO and the charge against her there is no evidence before me to indicate that the appellant is dishonest or untrustworthy. She has demonstrated a clear commitment to her family life with her husband and son in the UK and her mother in Portugal.

Assessment

19. I must first consider whether the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in the context of preventative grounds relied upon by the SSHD. The prevention of trafficking and modern slavery is undoubtedly a fundamental interest of society. Furthermore, as Mr Bates submitted, the public interest factors at paragraphs 7(a), (c), (g) and (i) of Schedule 1 to the EEA Regulations are all relevant.
20. It is clear from s. 23(2) of the Modern Slavery Act 2015 ('the 2015 Act') that a STRO may only be made if the court is satisfied that the person has acted in a way which means that:

“(a) there is a risk that the defendant will commit a slavery or human trafficking offence, and

(b) it is necessary to make the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the defendant committed such an offence.”

21. The court was clearly satisfied that the relevant test was met, and this was upheld upon appeal. It follows from the fact that a court imposed a STRO that the SSHD was entitled to consider the appellant as posing a potentially sufficiently serious threat for the purposes of regulation 27. As noted within the STRO guidance at [2.3.7], “*STROs enable action to be taken where this is necessary to prevent serious harm to the public notwithstanding the absence of conviction*”. In this regard I note the SSHD’s guidance on public policy, public security or public health decisions, dated 31 December 2020 (‘the EEA guidance’) to the effect that pending prosecutions generally constitute a barrier to removal and by analogy a barrier to refusing admission in respect of a person like this appellant, who was residing in the UK pursuant to a registration certificate. However, as the EEA guidance makes plain “*in some cases there will be sufficient evidence or other prior conduct, to justify taking a public policy or public security decision before the conclusion of any outstanding criminal proceedings*”. In my judgment the imposition of the STRO meant that this was a case with the potential to justify taking a public policy decision prior to the conclusion of criminal proceedings, subject to the threat posed in this particular case being “genuine and present”. This therefore needs to be explored further.
22. Mr Bates submitted that STROs are intended as an additional tool available to law enforcement agencies and are not a substitute for prosecution. He argued that by analogy the refusal of entry of a non-settled resident was a further additional tool available to the SSHD. That may well be so, but it was only available as an additional tool in relation to an EEA citizen in this context, where a decision to refuse entry is consistent with the principles set out at regulation 27(5) including:
 - the principle of proportionality;
 - the personal conduct of the person must represent a genuine, present and sufficiently serious threat taking into account past conduct, albeit the threat need not be imminent;
 - the decision may be taken on preventative grounds.
23. In my judgment, the appellant’s risk of engaging in trafficking or modern slavery or any related activity contrary to the fundamental interests of society has been (since the imposition of the STRO), and remains capable of being, managed by a combination of factors, such that the risk of any threat is very low and cannot be said to be “genuine and present”. That is a decision I reach in relation to the circumstances appertaining at the time of the 2019 decision and at the date of hearing. In particular:

- (i) The terms of the STRO itself forbade the appellant from getting involved in specific types of conduct for a two-year period in comprehensive and stringent terms (as summarised above), with breach being a criminal offence. There is nothing to indicate anything other than full compliance with the terms of the STRO on the part of the appellant. By the time of the 2019 decision, the appellant had demonstrated full compliance with the STRO over the course of some seven months. Although the STRO was imposed because the court was sure that it was necessary, the terms of the STRO achieved the aim sought, such that the serious threat posed by this appellant could no longer be said to be genuine and present at the time of the 2019 decision, and it was not necessary to refuse to admit her or revoke her registration certificate on preventative grounds at that stage. I do not accept that in the particular circumstances of this case, in which the appellant demonstrated complete compliance with the terms of the STRO, that public policy or preventative grounds required the SSHD to employ the additional tool of refusing to admit the appellant and revoking her registration certificate.
- (ii) Matters arising after the 2019 decision are relevant to the substance of the decision because they shed light upon my assessment at the time and further demonstrate that that the appellant did not pose a genuine and present serious threat to the safety of others or the public interest.
- (a) The appellant continued to fully comply with the terms of the STRO.
- (b) I note that there is specific power to renew a STRO in s.27 of the 2015 Act, but the appellant's STRO was not renewed upon its expiry on 31 October 2020. This tends to indicate that it was considered that there were sufficient measures in place to manage the appellant's risk pending her trial. Indeed, by that time the appellant had been charged with a criminal offence and was subject to court bail conditions.
- (c) The appellant has fully complied with the bail conditions imposed by the criminal court. I note that the appellant has been temporarily admitted to the UK on bail to attend criminal and immigration proceedings and has voluntarily departed to Portugal.
- (d) The appellant has clearly been aware since the charging decision was made in the summer of 2020 that she awaits an imminent criminal trial and is under the gaze of not just the immigration authorities but also law enforcement agencies. There is no evidence before me to indicate that she has been anything other than entirely compliant since

the imposition of the STRO and is likely to remain compliant.

(e) The appellant has been residing and can continue to reside with her husband and son in the UK at a known and settled address. H has stable employment in the UK to support both himself and the appellant.

24. I am therefore satisfied that any risk posed by the appellant as demonstrated by the imposition of the STRO and the decision to prosecute was and can be effectively managed such that the prospects of the appellant actually posing a threat to the fundamental interests of society during this period are low.
25. Even if I am wrong as to the nature and the extent of the threat posed by the appellant, I am satisfied that a decision based upon preventative grounds in all the circumstances of this case was disproportionate at the time of the 2019 decision and remains so, for a combination of reasons. In addition to the low risk level of the threat because it was being effectively managed by the terms of the STRO, there are further relevant factors in this case.
26. First, the appellant has clearly faced challenging times in looking after her parents in Portugal. Her father died last year and her mother remains ill. She has had to balance this with supporting her husband, who has faced his own difficult medical and family concerns in the last few years. Their respective priorities and attention are firmly directed in favour of caring for their parents and in supporting one another during the pandemic, albeit by necessity, from a distance.
27. Second, although family life could be enjoyed in Portugal in principle, this would not be reasonable or proportionate at the date of the 2019 decision or now. H carefully explained that he has significant commitments in the UK including his long-standing employment and his parents. His employment involves managing a team using specialist machinery and I accept his evidence that this specialist job would not be available to him in Portugal. His elderly parents have become increasingly dependent upon him, which has become even more stark during the pandemic. It is also clear that H has struggled with his mental health since his first wife died and he continues to find life very difficult for a combination of reasons. To his credit, he has been able to continue to work hard at his job during this period. I am satisfied that there are significant obstacles which prevent H's relocation to Portugal.
28. Third, Mr Bates accepted that the appellant will be permitted to re-enter the UK for the purposes of preparing for her trial and attending the trial itself. The trial is only a few months away in November 2021. The outcome of the trial is likely to be a significant factor in

any decision regarding the appellant's immigration status, and the matter will inevitably have to be reconsidered in more depth after the trial. The outcome of my decision will accordingly have a relatively limited impact for a relatively short period of a few months.

29. While I acknowledge the seriousness of the imposition of the STRO and the prosecution faced by the appellant, and that this constitutes a threat to fundamental interests of society, the risk of harm posed by the appellant has been low since the imposition of the STRO. The need to prevent that harm in this case is outweighed by the strength of the family life between the appellant and H in circumstances wherein there are serious obstacles to H relocating to Portugal. Consequently, the 2019 decision was disproportionate, and remain so.
30. Mr Bates raised the concern that the appellant was granted a registration certificate based upon her then lawful employment as a cleaner but she subsequently undertook unlawful employment as a sex worker, which meant that she was no longer "a qualified person". However, it is not unlawful to pay for sex if the person has not been forced into sex work. Mr Bates further submitted that the appellant would not be a qualified person now because of her caring responsibilities in Portugal. The situation at present is hugely complicated by the pandemic, and a degree of flexibility is required. In any event, the 2019 decision did not cite the appellant's employment or lack thereof, as a reason justifying the decision. This was solely based upon public policy / preventative grounds, which I have already addressed.
31. For the avoidance of doubt, I do not consider it to be appropriate to engage in speculation as to whether (notwithstanding the appellant's clear evidence to the contrary in her witness statement), she was trafficked or forced to work as a sex worker in the UK. Ms Shaw made detailed submission on this issue within her skeleton argument and invited me to find that the appellant's denial that she was trafficked or forced to work as a sex worker is unreliable. It is not necessary to make findings on this issue in the light of the other findings I have made. I note s. 45 of the 2015 Act provides a defence for victims of trafficking who commit an offence. That is a matter that may be explored in more detail during the course of the criminal proceedings, and in my view it is both premature and unnecessary to enter into any analysis of the issue at this stage.

Decision

32. I re-make the decision by allowing the appeal under the Immigration (EEA) Regulations 2016.

Signed: *UTJ Melanie Plimmer*
Judge of the Upper Tribunal

Date:
19 March 2021