Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001788
[DA/00052/2021]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 August 2022	**On 20 November 2022**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LENCI SPATA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Pipe, Counsel instructed by Clifton Law solicitors

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, for convenience I refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Albania born in 1988. On 29 October 2020 the respondent made a decision to deport the appellant in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). That decision was made following the appellant's conviction for possession with intent to supply class A drugs and

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possession of criminal property, for which offences he received a sentence of seven years' imprisonment, and twelve months' imprisonment to run concurrently.

3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge J M Dixon ("the FtJ") at a hearing on 6 October 2021 following which the appeal was allowed.

4. The respondent contends that the FtJ provided inadequate reasoning for concluding that the appellant does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The grounds refer to the seriousness of the offence, and the sentencing remarks indicating that the appellant had a significant role in the offence, at the upper end. Even though he had pleaded guilty the offence was so serious that he received a sentence of seven years' imprisonment. The OASys report referred to the appellant as being at low risk of offending but a medium risk of harm which meant that the consequences of re-offending would be very serious.

5. The grounds refer to the decision in *Tsakouridis* [2010] EUECJ C-145/09 (23 November 2010) in terms of the seriousness of drug offending.

6. The grounds also contend that the FtJ failed to consider that as at the date of the hearing the appellant had only been released from prison for a very short period of time. It is argued that the FtJ failed "to consider the appellant's credibility in the round with his criminality", namely drug dealing over a two year period involving class A drugs in and around the family home.

7. Paragraph 6 of the grounds states that the Secretary of State "considers the appellant to be a threat to the fundamental interests of society" and the FtJ failed to have regard to Schedule 1 of the EEA Regulations. Paragraph 7 of the grounds argues that the decision to deport the appellant was proportionate, and that the appellant's particular circumstances, including in terms of his stepson and wife, meant that the appeal should have been dismissed.

8. A 'rule 24' response on behalf of the appellant resists the appeal.

Submissions

9. Mr Tufan relied on the grounds of appeal. He reiterated the contentions that the FtJ failed to consider the appellant's credibility in the round and failed to take into account relevant aspects of Schedule 1.

10. It was submitted that although the OASys report referred to a low risk of re-offending, there was a medium risk of harm. It was submitted that overall, the FtJ's decision was 'one-sided' in favour of the appellant.

11. The particular aspects of Schedule 1 which Mr Tufan argued were not taken into account by the FtJ were paragraphs 3 and 7(f), (g) in terms of protecting the public.

12. Although the FtJ had taken into account the issue of rehabilitation, that was not a factor that was relevant.

13. In his submissions, Mr Pipe relied on the rule 24 response. He submitted that the respondent's grounds and submissions amount merely to a disagreement with the FtJ's conclusions, masquerading as a rationality challenge. In that context I was referred to the decision in *Joseph (permission to appeal requirements)* [2022] UKUT 00218 (IAC).

14. In order to make good his submission that the FtJ had given comprehensive reasons for his decision, Mr Pipe took me to various parts of the FtJ's decision, highlighting aspects of the FtJ's reasoning. He submitted that it was plain from the FtJ's decision that he recognised the seriousness of the offending, not only in its own right but in the context of the sentencing remarks.

15. It was further submitted that although the FtJ's assessment of rehabilitation was sustainable, nothing turns on that issue given the FtJ's conclusion that the appellant does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

16. In reply, Mr Tufan referred to what is said in the OASys report in terms of the risk of re-offending rising to 22% within two years, a percentage more than was said in *MA (Pakistan) v Secretary of State for the Home Department* [2014] EWCA Civ 163 was sufficient for a finding that the appellant in that case (albeit not an EEA case) represented a risk of re-offending.

Assessment and Conclusions

17. I announced at the conclusion of the hearing that I was not satisfied that there is any error of law in the FtJ's decision and accordingly the Secretary of State's appeal is to be dismissed.

18. It is perfectly true that the appellant was convicted of a very serious offence involving possession with intent to supply class A drugs which, as the FtJ pointed out at paragraph 3 of his decision, represented a street value of between £80,000 and £100,000 and as set out in the sentencing remarks.

19. The contention on behalf of the respondent that the FtJ failed to recognise, or take into account, the seriousness of the offence fails to have regard to paragraph 3 of the FtJ's decision, including where he refers at paragraph 5 to the offences having been committed over a period of about two years and at paragraph 37 referring to the evidence that the appellant had class A drugs in and around the family home. The FtJ returned to the issue at paragraph 68, stating that the fact that the appellant was prepared to handle drugs in close proximity to the family home "plainly raises some significant concerns about the appellant's thinking at the time". He again referred to the period of drug dealing as being for a period of around two years. Similarly, at paragraph 68 he refers to the significant role that the

appellant was found to have played in the offence as one of the participants.

20. The specific contention in the grounds that the FtJ failed to take into account that the appellant had only recently, as at the date of the hearing before the FtJ, been released from prison/detention, similarly fails to appreciate significant features of the FtJ's decision. At paragraph 12 the FtJ referred to the appellant's conditional release on licence on 17 May 2021, and then his detention and release on bail (immigration) on 3 June 2021. He referred to a letter from the Probation Service dated 5 October 2021 (the day before the hearing) confirming that the appellant had been complying and engaging well with his supervision on licence. He also referred in this context to the OASys assessment of May 2018 which referred to the risk of re-offending being low and the risk of serious harm being medium. That report also refers, as the FtJ pointed out, to the appellant's remorse. Furthermore, at paragraph 18 there is again reference to the release on 3 June 2021 and the appellant's evidence of his attendance at probation appointments and (paragraph 19) that he said that he had been in the community for four months and did not want to go back to prison.

21. Whilst, therefore, the FtJ could have concluded that the relatively recent release of the appellant meant that it was too soon to assess the risk of re-offending with reference to the period of time he had then been in the community, it is not true to say, as asserted on behalf of the respondent, that the FtJ was not cognisant of that period.

22. Under regulation 27 of the EEA Regulations 2016 there is a requirement that the personal conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct and that the threat does not need to be imminent.

23. This particular feature of the EEA Regulations received detailed consideration by the FtJ. It is important to note that the context of the FtJ's analysis of this issue is the unequivocal conclusion that both the appellant and his wife gave honest and reliable evidence. The FtJ gave reasons for that view. At paragraph 67 he referred specifically to the requirement that the appellant pose a sufficiently serious threat etc. At paragraph 68 he said as follows:

> "I do not in any way minimise the serious nature of the Class A drug dealing which the appellant was involved in. He had a significant role and it involved the handling of what the sentencing judge found to be the equivalent of around 1000 average street deals. I also note, as observed by Mr Aigbokie, that the appellant as arrested in the vicinity of his home address. Although there is no evidence that his wife and stepson were ever aware of his involvement in drugs and this was not explored on behalf of the respondent in cross examination (no doubt because there was no evidential basis for it), being prepared to handle drugs in close proximity to the family home plainly raises some significant concerns about the appellant's thinking at the time. I

> recognise the substantial public interest and, to use the language of the EEA Regulations, strong public policy grounds in the removal of people who participate in this type of criminality. However, as correctly observed by the sentencing judge, the appellant was a man of previous good character. He has a caution for simple possession of cannabis back in 2012 but, given the very different nature of that offence as well as the passage of time since that offence, it is right to regard him as having been a person of previous good character. I concur with the view of the sentencing judge in that regard. In his asylum interview, the appellant candidly acknowledged that he had been involved in drug dealing for around two years or so. Standing back and looking at the appellant as a whole in terms of his overall character, in my judgement the offending is properly to be regarded as very much an exception to how the appellant has otherwise conducted his life."

24. At paragraph 69 the FtJ referred to the extent to which financial pressures might elevate the appellant's risk of re-offending but he gave reasons for concluding that it would not. He rejected the contention that the appellant having two frail relatives in Albania may recreate the pressures he was under before. Those earlier financial pressures are said to have involved expensive private medical treatment for the appellant's father, who was suffering from cancer.

25. Again, in paragraph 69 there is the following:

> "I am satisfied that the appellant has been through a thoroughgoing process of reflection both on his own and in the context of regular conversations with his wife, such that he is genuinely remorseful for what he did and does not want to get himself into any further trouble either in a way similar to the offending or indeed in any other way. The evidence on this both from himself and his wife was very clear and credible."

He went on to refer to the appellant's separation from his wife and stepson for a substantial period of time whilst he was in prison having had a "deep impression on his attitude and, to my mind, this constitutes a significant protective factor going forward." He referred to the OASys assessment again reflecting the appellant's remorse and the FtJ concluded that his contrition "is genuine and operative".

26. The evidence from the appellant's wife which the FtJ referred to in detail, plainly reinforced that of the appellant in terms of the potential for risk of re-offending.

27. It is also instructive to point out that the FtJ noted that the respondent during the course of the hearing did not raise any concerns as to the appellant's honesty. He said that the appellant's evidence was reinforced by evidence of his positive engagement in offending behaviour work in prison and since his release he had complied and engaged well with supervision requirements. He concluded that the appellant was motivated to live a law-abiding life in future. Numerous other aspects of the evidence given both by the appellant and his wife were referred to by the FtJ in the assessment of future risk.

28. Although the respondent raised a concern before the FtJ in terms of what would happen if the appellant was not to have stable accommodation in future, the FtJ found that the appellant has got stable accommodation with his wife and son and although the financial situation was "tight" they nevertheless managed. He referred to the prospects of the appellant obtaining employment. He also took into account what he described as a "renewed sense" of the importance of needing to be there for his stepson and to make up for the lost time incurred as a result of his conviction and sentence.

29. Importantly, the FtJ took into account the OASys assessment which was that the appellant represented a low risk of re-offending. He was aware of the fact that there was said to be a medium risk of harm but it is plain that he took that into account in terms of the assessment of whether the appellant represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society. He recognised that those fundamental interests are adversely affected by serious drug offending.

30. The contention that, by comparison with the risk found in *MA (Pakistan)*, the FtJ wrongly assessed the risk of re-offending, has no merit. Quite apart from the fact-specific assessment that must be made in each case, in *MA (Pakistan)* that appellant continued to deny his guilt, a stark contrast with the facts of this case.

31. As regards the Schedule 1 factors which the respondent argues the FtJ failed to take into account, it is clear from paragraph 68 that the FtJ had those factors well in mind, in terms of the risk posed by a person who has a conviction for a serious offence (Schedule 1 paragraph 3) as can be seen from paragraph 68 of the his decision where he refers to the seriousness of the offence and the level of the appellant's involvement in it. The fundamental interests of society as identified, non-exclusively, in Schedule 1 paragraph 7 in terms, for example, of harm to society, maintaining public confidence and protecting the public, are plainly matters that the FtJ had in mind in his reasoning, as can be seen again, for example, in paragraph 68. That is added to the fact that the FtJ set out verbatim Schedule 1 and referred to it again at paragraph 55.

32. So far as the rehabilitation point is concerned, at paragraph 80 the FtJ gave relatively brief but clear reasons for concluding that the appellant's prospects for rehabilitation in the UK were better than in Albania. It is not the case, as asserted in the grounds, that there is an absence of evidence in terms of the relative prospects for rehabilitation. The assessment of the appellant's family life and relationship with his wife and child as described at paragraph 79 feeds into the FtJ's conclusions in terms of rehabilitation.

33. Paragraphs 6 and 7 of the Secretary of State's grounds of appeal (referred to in paragraph 7 of my decision) illustrate that the challenge to the FtJ's decision does indeed amount only to a disagreement with the his decision but does not establish any error of law.

34. In all the circumstances, I am not satisfied that there is any error of law in the FtJ's decision and his decision to allow the appeal must stand.

Decision

35. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal, therefore, stands.

A. M. Kopieczek

Upper Tribunal Judge Kopieczek 6/10/2022