Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI/2022/000354
DA/00227/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 May 2022	**On 13 July 2022**

Before

THE HON. MRS JUSTICE HILL
(sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GERSON DOS SANTOS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms Radford, Counsel instructed by Turpin Miller LLP

DECISION AND REASONS

Introduction

1. We refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a Portuguese citizen, born on 14 February 1989. The Secretary of State for the Home Department ("SSHD") appeals against a decision of Judge Blackwell of the First-tier Tribunal ("the Judge")

promulgated on 14 January 2022 after a hearing on 1 December 2021. By that decision, the Judge allowed the Appellant's appeal against the SSHD's decision dated 17 July 2020 to exclude him from the United Kingdom ("the UK") under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and to refuse his human rights claim.

2. The SSHD's grounds of appeal advanced only one ground, relating to the Judge's approach to the issue of whether "imperative grounds of national security" under Regulation 27(4) existed. Permission to appeal on this ground was granted by First-Tier Tribunal Judge Scott on 10 February 2022. In her Skeleton Argument dated 14 April 2022 the SSHD applied to amend her grounds to include two new grounds relating to the Judge's approach to the "new matter" of the Appellant's partner and child. The Appellant's Rule 24 response dated 20 April 2022 did not object to the proposed amendment and provided a substantive response to the new grounds. For this and other reasons, by a decision dated 5 May 2022, Upper Tribunal Judge Norton-Taylor granted the SSHD permission to amend her appeal in this way.

The factual background

3. The Appellant came to the UK when he was 3 years old, following the death of his mother. He and his sister were raised by his grandmother until her death in 1999 and then by their uncle. The Appellant was educated in Newham.

4. According to the OASys assessment the Appellant was convicted of robberies in Portugal on 29 June 2005 and 27 October 2009, receiving a sentence of 3 years and 6 months imprisonment for the latter offence.

5. Between 27 November 2007 and 10 July 2017, he was convicted of 19 offences, and received two cautions, in the UK. These included convictions for drugs, dishonesty and driving offences, robbery, burglary, violent disorder and for breaching court orders in various respects. The final offences which led to this decision to deport him comprised (i) a conviction for conspiracy to possess a prohibited weapon, for which he was sentenced to eight years' imprisonment; and (ii) offences of conspiracy to commit fraud and to possess articles for use in fraud, for which he was sentenced to eight and twelve months' imprisonment respectively, to run concurrently, giving a total of nine years' imprisonment.

6. In her sentencing remarks, the trial judge noted that the firearms involved in offence (i) above were two prohibited handguns, both of which were in working order and loaded with a total of 24 rounds of ammunition. One was a semi-automatic Uzi pistol. This placed the firearms "at the top end of the category" for sentencing purposes. The firearms had not been used because the conspiracy in which the Appellant and his co-defendants were engaged was interrupted by the police. As to their intended use, the Appellant's co-defendant Thompson had been convicted of possession of the firearms with intent to endanger life. The Appellant had not been

convicted of such an offence, but the jury had rejected his claim that he had been merely holding the firearms for another. The trial judge said she was satisfied that "the firearms and ammunition were deliberately obtained…to carry out some criminal activity. There can be no innocent reason to obtain and be in possession of loaded firearms."

7. There was also evidence in the OASys assessment that on the day of his arrest the Appellant had passed a "large knife" to a co-defendant who used it to threaten a man.

8. On 17 July 2020 the decision to deport the Appellant was made and a deportation order signed. He appealed this decision to the First-tier Tribunal.

9. The Appellant had been subject to notices to deport him twice before, but on both occasions his appeal was upheld by the First-tier Tribunal and in respect of the first notice, upheld by this Tribunal: see the decisions of the First-tier Tribunal dated 13 April 2011 and 18 June 2014 and the decision of this Tribunal dated 1 September 2011.

10. On 11 January 2021 the Appellant was released on immigration bail to reside with his partner, a Swedish national. On 2 October 2021, their first child was born.

The legal framework

11. Regulation 23(6) of the 2016 Regulations provides that an EEA national who has entered the UK may be removed if the SSHD has decided that their removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27.

12. The parties agreed that the Appellant enjoys the highest level of protection under the 2016 Regulations, such that he may only be removed on imperative grounds of national security, under Regulation 27(4) thereof.

13. Regulation 27(5) sets out certain factors that must be taken into account where a deportation decision is taken on grounds of public policy or public security, as follows:

> (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.

14. Regulation 25(6) provides that before taking a deportation decision on the grounds of public policy and public security in relation to a person 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 the person, their length of residence in the United Kingdom, their social and cultural integration into the United Kingdom and the extent of their links with the country of origin.

15. Regulation 25(8) provides that a court or tribunal considering whether the requirements of the regulation are met must, in particular, have regard to the considerations contained in Schedule 1. These relate to considerations of public policy, public security and the fundamental interests of society.

The Judge's decision

16. At [10] of his decision, the Judge summarised the central issues for the appeal as being (i) whether the Appellant presented a sufficiently imperative threat to public security; and (ii) if so, whether his deportation would be proportionate under the 2016 Regulations. The Appellant had raised a third issue, namely whether his deportation was also proportionate under domestic law, but Ms Radford (who represented him before the Judge and on the appeal) conceded that this did not add anything material to the question of proportionality under the 2016 Regulations: [48].

17. At [13]-[32], the Judge summarised the documentary and oral evidence he had received. The Appellant, his partner and his cousin had all given evidence. Only the Appellant had been cross-examined on behalf of the SSHD. The written submissions from the Appellant included a skeleton argument to which was appended a 25 page summary of the relevant law: [13(c)-(d)].

18. At [33]-[35], the Judge set out the pertinent provisions of the 2016 Regulations. At [36]-[39], he summarised the key passages from the caselaw illustrating the extremely high nature of the "imperative grounds" threshold and the way it is to be applied in practice, namely Land Baden-Würrtemberg v Tsakouridis [2010] C-145/09, P.I. Oberburgermeisterin der Stadt Remscheid [2012] C-348/09 and LG v Italy [2008] EWCA Civ 190.

19. At [40]-[48], the Judge summarised the respective cases advanced by the parties. For the reasons given at [50]-[70], he accepted the Appellant's submissions to the effect that imperative grounds were not made out, allowing the Appellant's appeal on that basis.

Analysis

(i): The "new matters" issues

20. In her Skeleton Argument, the SSHD highlighted that it was accepted by both parties at the hearing that the issue of the Appellant's partner and child was a "new matter" that had not previously been addressed by the SSHD. Further, the SSHD had not given her consent for this new matter to be considered at the hearing. The SSHD argued that the Judge erred in his approach to this issue by (i) failing to adjourn the hearing to allow the SSHD to consider the new matter (applying the unfairness test set out in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 at [13]); and (ii) taking the matter into account in the substantive decision.

21. In response, the Appellant argued that the Judge had not erred because (i) it was not procedurally unfair to refuse the adjournment as the SSHD had been on notice of the imminent birth of his child since 10 August 2021 and this had been one of the reasons for the adjournment of the appeal hearing from October 2021 to January 2022; (ii) her published policy indicated that she could consider new matters at short notice and she had failed to do so; (iii) she had therefore unreasonably withheld consent; and (iv) in any event, the Judge had explicitly excluded consideration of the new matters from his decision.

22. In advance of the hearing we reviewed the different paragraphs of the decision relied on by each party in support of their submissions as to whether the Judge had in fact taken the new matters into account.

23. At the outset of the hearing we indicated our provisional view that [11], [15], [51] and [53] of the decision showed that the Judge had expressly disregarded the new matters, albeit that some evidence had been heard about them (without objection from the SSHD). Further, where the Judge had referred to the new matters at [45(k)] and [46(i)] of the decision, this was where the Judge was summarising the Appellant's submissions rather than making findings of his own.

24. Mr Tufan for the SSHD accepted the force of these points and did not pursue these grounds of appeal at the hearing. In our view he was right to do so because whether or not there was any error with respect to the adjournment issue, the decision makes clear that the Judge did not take the new matters into account. Further, the Judge had specifically recorded at [12] that if he found in favour of the Appellant, the new matters would be irrelevant, and that is what occurred.

(ii): The "imperative grounds" issue

25. The Appellant emphasised the well-recognised principle that the mere fact that one tribunal has reached what may seem an unduly generous view of the facts does not mean that it has made an error of law: see, for example,

Mukarkar v SSHD [2006] EWCA Civ 1045 at [40], per Carnwath LJ (as he then was).

26. The SSHD's arguments on this issue were quite diffuse, but we consider that they can be fairly distilled into four key points.

27. First, the SSHD argued that the Judge had not undertaken an anxious scrutiny of the facts and had given inadequate reasons for his conclusion that imperative grounds were not made out. Reliance was placed on the fact that the structure of the decision reflected, as set out above, a detailed summary of the evidence and the law, but then an analysis section that was "limited to a mere 2 and half pages out of 23 pages" illustrating a "superficial" approach.

28. Our task as an appellate tribunal is to review the decision as a whole. When that approach is taken, we agree with the Appellant that the Judge's level of scrutiny or analysis is not lacking. He set out the evidence and the law in some detail. His analysis section has to be read with the earlier detailed sections in mind. His reasons for finding that imperative grounds were not made out meet the test set out in R (Iran) [2005] EWCA Civ 982, per Brooke LJ at [13]-[15], in that although they may not be considered elaborate, they are sufficiently clear for the parties to know why they won or lost. The Judge had had the benefit of detailed submissions from the Appellant and preferred those, and it is appropriate for this appellate tribunal to consider that underlying material in order to understand the Judge's reasons further as necessary: see, for example, English v Emery Reimbold & Strick Ltd [2002] 1 W.L.R. 2409 at [11] and [89]

29. Second, the SSHD argued that the Judge had failed to assess the specific facts of the case, including the nature of the index offence, the Appellant's degree of involvement in it, the potential sentence and the sentence actually imposed, and his risk of re-offending. The seriousness of the threat the Appellant posed was clearly escalating, and the Judge had failed to recognise this.

30. Looking at the decision as a whole, we do not consider that these criticisms are merited.

31. The Judge set out the background to the Appellant's offending at [4]-[7], including giving a detailed list of each of his convictions and the sentences imposed at [4]. He observed that the index offence (the most serious of the offences for which he had been sentenced) was "a very grave instance of conspiracy to possess a prohibited weapon": [67]. He repeated the key elements of the judge's sentencing remarks as to the nature of the index offence at [55], having set out the remarks in detail at [5]. These specifically referred to the Appellant's role in the offences.

32. As to sentencing, the Judge had clearly considered the criminal judge's sentencing remarks. These remarks noted that the maximum and minimum sentences for the index offence was 10 and five years'

imprisonment respectively. The Judge was aware that the Appellant had received eight years' imprisonment for the index offence, with a nine years' sentence overall: 4(o). The Judge appeared to suggest at [67] that the Appellant had received a nine year sentence for the firearms offence alone: if that it was he intended, this would have been to the Appellant's disadvantage in the analysis and not the SSHD's.

33. Further, the Judge gave careful consideration to the Appellant's risk of re-offending. He set out the Appellant's account of his rehabilitation at [15]-[21]. He summarised the evidence as to this risk from both the independent expert and the OASys material at [50]-[52]. He made a clear finding that he adopted the OASys evidence as to the risk of re-offending (namely a high risk of non-violent offending and a medium risk of violent offending) at [53]. He also noted that he had to bear in mind the risk of the Appellant offending in Portugal if he returned there, especially given that he had offended there before at [56].

34. Finally the Judge considered the Appellant's index offence in the context of his previous criminality, specifically finding that there had been an "escalating level of seriousness in the offences committed" by him: [54]. However, we accept the Appellant's submission that what the Judge was not willing to do was to extrapolate from this finding of escalation a conclusion that imperative grounds were made out. He was entitled to take that approach on the evidence before him.

35. Third, the SSHD submitted that in assessing whether the imperative grounds threshold was met, the Judge had unduly focussed on the nature of the Appellant's index offence, and whether this was one of the specific offences listed in the relevant EU law provisions, as considered in Tsakouridis.

36. Having analysed the submissions made and the Judge's decision with care, we disagree. The Judge did not in fact approach this exercise on the basis that only those offences now listed in Article 83 of the Treaty on the Functioning of the European Union would meet the imperative grounds threshold. Rather, he correctly asked himself whether the Appellant's offending was of a similar severity to those offences listed in Article 83, applying Tsakouridis and PI, as those offences were a good indication of the sort of offences the CJEU considers meet the imperative grounds threshold.

37. Having conducted that exercise, we consider that it was rationally open to the Judge to find that the index offence of conspiracy to possess a firearm was of a lesser severity to offences relating to "illicit arms trafficking", as referred to in Article 83 (see his decision at [66]-[68]). As Ms Radford pointed out during the appeal hearing, between those two sorts of offences is the offence of possession of a firearm with intent to endanger life, which illustrated the sliding scale of severity in issue.

38. Finally, although the nature of the index offence occupied a substantial part of the Judge's analysis section, looking at the decision as a whole, we do not consider that the Judge focussed solely, or unduly, on this issue. As we explain at paragraphs 31-34 above, he also had careful regard to the Appellant's background, his rehabilitation and his risk of re-offending.

39. Fourth, the SSHD argued that the Judge failed to have sufficient regard to the fact that the Appellant had been considered to be "part of a criminal drug gang" and a "close associate of a self-confessed drug dealer". This was important given the recognition in Tsakouridis, as reiterated in PI, that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of imperative grounds of public security. It is also an important part of the UK's national context.

40. Again, we accept the Appellant's arguments on this issue. There was no clear evidence that the Appellant was a member of a "drug gang" or involved in drug dealing. The sentencing judge did not indicate that he was: she had specifically said she could not indicate why the group had possession of the guns, simply that it was for an unlawful purpose. The SSHD's initial deportation letter had not claimed that the Appellant was a member of a drug gang or involved in drug dealing. In those circumstances, the Judge was not required to engage with lines of argument not pursued by the SSHD in the appeal or borne out by the evidence. Indeed Mr Tufan accepted during the appeal hearing that a fairer reading of the evidence was that the Appellant was only "tangentially" a gang member.

Conclusions

41. Overall, the Judge properly directed himself on the law: he referred to the key parts of the Regulations, the principle that the threshold for imperative grounds is extremely high and the pertinent case law. He had regard to all the factors set out in Regulation 27(5) and conducted the holistic assessment necessary. The conclusion he reached was one that was rationally open to him.

42. For all these reasons we are not persuaded by the SSHD's submissions that the Judge erred in law.

Notice of Decision

The appeal is dismissed.

Signed: Mrs Justice Hill Date: 24 May 2022

The Hon. Mrs Justice Hill

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**