IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004542
First-tier Tribunal No:
DA/00791/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

THE HON. MRS JUSTICE HILL
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JLL
(anonymity order made)

Respondent

Representation:
For the appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the respondent: Ms A Smith, Counsel, instructed by Turpin & Miller LLP

Heard at Field House on 24 January 2023

DECISION AND REASONS

Introduction

1. We refer to the respondent as the appellant as he was before the First-tier Tribunal. The Secretary of State for the Home Department appeals against a decision of Judge Bird of the First-tier Tribunal promulgated on 11 July 2022. By that decision, the Judge allowed the appellant's appeal against the Secretary of

State's 19 November 2018 decision, maintained in further correspondence thereafter, to deport him under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). Permission to appeal was granted by First-tier Tribunal Judge Howard on 2 August 2022.

The factual background

2. The appellant is a citizen of the Netherlands, born on 20 January 1999. He claims to have arrived in the UK in 2002, aged 3. Between 13 August 2012 and 22 June 2018 he was convicted on 14 occasions of 26 different offences. These included offences of assaulting a police officer, attempted robbery, theft, possession of a Class B drug, going equipped for burglary, possession of a bladed article and various other offences. None of these offences carried a term of imprisonment of 12 months or more.

3. On 19 November 2018 the respondent made the decision to deport the appellant under regulation 23(6)(b) and 27 the EEA regulations 2016, and refused his human rights claim based on Article 8 of the ECHR.

4. On 24 June 2019 the appellant was convicted of conspiracy to supply Class A drugs. On 27 September 2019 he was sentenced to 46 months' detention in a Young Offenders Institution at Woolwich Crown Court. The sentencing remarks make clear that the conspiracy had operated from December 2015 to 25 January 2017.

5. The appellant's representatives provided further information to the respondent about his father's exercise of treaty rights. It was pointed out that his father had acquired a permanent right of residence on 11 October 2007 and had since then been continuously resident in the UK for a period of over 10 years. On that basis it was submitted that the appellant's deportation could only be justified on imperative grounds of public security.

6. On 2 January 2020 the respondent wrote a supplementary letter to the appellant's solicitor maintaining the decision to deport him.

7. On 5 May 2021 the appellant was released from prison to approved premises but on 4 June 2021 he was recalled.

8. On 9 December 2021 he was released but by 17 January 2022 he had been remanded in custody again, in respect of two further alleged offences of supplying Class A drugs.

9. On 21 January 2022 at a case management review hearing before the First-tier Tribunal judge it was established that the appellant was on remand facing criminal charges.

10. The respondent carried out a further review of the appellant's case following receipt of his appeal bundle.

11. By a letter dated 16 March 2022 the respondent's decision to deport the appellant was maintained. The letter also considered the appellant's grounds

relating to Articles 3 and 4 of the ECHR. The appellant had submitted psychiatric evidence and expert evidence relating to modern slavery. The letter concluded that the appellants removal would not be in breach of Articles 3 or 4.

12. On 18 March 2022 the appellant was sentenced to 30 months' imprisonment at Lewes Crown Court for the two further offences of supplying Class A drugs.

The First-tier Tribunal hearing and decision

13. The appeal hearing took place before the First-tier Tribunal judge on 7 April and 23 May 2022. The appellant gave evidence, as did his mother, father and sister.

14. In submissions the respondent accepted that the appellant had been able to establish that he had spent five years continuously in the UK as a qualified person, and that he had been in the UK for a period of 10 years. However it was not accepted that this 10 years had been uninterrupted. The appellant submitted that he was entitled to the highest level of protection on the basis that under regulation 27(4) he had been in the UK for 10 years prior to the deportation decision being taken.

15. The First-tier Tribunal judge concluded that the appellant was entitled to the highest level of protection. By the time of his incarceration on 27 September 2019, he had been in the UK for at least 16 years. The respondent's initial decision was made on 19 November 2018, at which point he had been in the UK for around 15 years. The respondent's argument that the 10 year residence period was broken by the appellant's incarceration failed to appreciate that this happened after the decision to remove him in November 2018.

16. The judge observed that narcotics are detrimental to the well-being of the public, but did not consider that the facts of this case showed that the appellant represented a sufficiently serious threat affecting one of the fundamental interests of society. The judge noted that there was no suggestion by the respondent that the appellant had been involved in dealing narcotics as part of an organised gang (although it was believed that he may have been involved with the gang there was no evidence that he was part of a larger organised criminal group).

17. The judge placed reliance on the fact that in February 2021 a positive conclusive grounds decision was made through the National Referral Mechanism ("NRM"), to the effect that the appellant had been a victim of modern slavery during 2016-2017 for the specific purposes of forced criminality. This related to the criminal activity that the appellant had been engaged in up to the age of 18 that had led to his 2019 conviction.

18. The judge also referred to the report provided by the appellant from Lisa Davies, consultant forensic psychologist. This confirmed that the appellant was exploited for criminal purposes between 2016 and 2017 when he was aged 17; and that there may have been an earlier period of trafficking when the

appellant was 15. Ms Davies had considered the appellant's background in detail and explained what led to his drug addiction and subsequent exploitation.

19. The judge found that the fact that the appellant was coerced into committing offences further showed that he was not someone who posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

20. The judge considered whether removal of the appellant would be proportionate taking into account his personal circumstances. The judge noted that he had come to the UK aged 3 and had lived here ever since. His family are in the UK. He has no family network in the Netherlands. There was evidence to support the fact that he been trafficked for the purposes of criminality.

21. Further, the judge noted that he has complex mental health issues as outlined in a report from the consultant psychiatrist Dr Galappathie. The appellant had been diagnosed with a severe depressive episode, generalised anxiety disorder and PTSD. Dr Galappathie was of the view that if the appellant were to be removed from the UK, that would trigger an acute deterioration in his mental health and he would be likely to act in an impulsive manner by way of attempting to commit suicide, given a recent attempt to do so by taking an overdose. The report also noted that if he was returned to the Netherlands and separated from his partner, family and support network in the UK, this was likely to lead to him feeling isolated, unable to cope and placed at high risk of returning to substance misuse. This would likely further worsen his mental state and increase his level of vulnerability. He was likely to present with a high risk of vulnerability towards being re-trafficked and exploited into further forced criminality given his past trafficking experience.

22. Taking all these factors together, the judge concluded that it would be disproportionate to remove the appellant to the Netherlands; and that the respondent had therefore failed to show that his removal was justified on imperative grounds of public security.

The legal framework

23. The material parts of the EEA Regulations 2016 are as follows:

> **"Decisions taken on grounds of public policy, public security and public health**
>
> **27.**- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.

(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.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(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.

(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...

(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.).

SCHEDULE 1

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) 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

offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(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);

(l) countering terrorism and extremism and protecting shared values".

The application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008

24. By this application dated 9 January 2022 the respondent sought to admit the judge's sentencing remarks dated 18 March 2022. While the First-tier Tribunal judge was aware of the fact of the appellant's sentence it does not appear that the full sentencing remarks were before the judge. The respondent submitted that they would assist the Upper Tribunal in the just disposal of the appeal.

25. Rule 15(2A) provides as follows:

"(2A) In an asylum case or an immigration case –

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence".

26. Ms Smith did not oppose the admission of the evidence.

27. We consider that it would be consistent with the overriding objective to admit this evidence. We have therefore take it into account.

Submissions and discussion

28. At the appeal hearing Mr Melvin relied on the respondent's grounds and a skeleton argument drafted by Alain Tain, Senior Home Office Presenting Officer. Ms Smith for the appellant relied on the detailed Rule 24 response drafted by David Sellwood, counsel.

29. The respondent did not seek to challenge the First-tier Tribunal's decision that the appellant was entitled to enhanced protection pursuant to regulation 27(4) for the reasons given by the judge at [54]-[56] of the decision. Accordingly the appeal proceeded on the basis that the EEA regulations 2016 required the respondent to show that there were imperative grounds of public security justifying the appellant's deportation.

Submissions and discussion

Ground 1

30. The respondent's first ground asserted that the judge had failed to have regard to a material matter namely whether imperative grounds existed, specifically because insufficient regard had been had to the fact that the drugs offending of which the appellant had been convicted affected the fundamental interests of society.

31. Mr Melvin referred to paragraph 7(g) of Schedule 1 to the EEA regulations 2016, which expressly lists crimes relating to the misuse of drugs as one of the fundamental interests of society. He submitted that the misuse of drugs can be taken into account for this purpose even without an international cross-border element. The judge's sentencing remarks from 27 September 2019 unequivocally showed the destructive effects of the county lines operation in which the appellant had been involved in the community in question. Reference had also been made to the presence of weapons at locations from which the gang operated and the exploitation of vulnerable persons to execute their operations. Mr Melvin submitted that these factors were relevant to other matters within paragraph 7, namely the preventing of social harm, the protection of the rights and freedoms of others and protection of the public under paragraphs 7(c), (i) and (j). He argued that the judge had failed to appreciate the wider harm of the appellant's criminality: this was unquestionably a case where the appellant's criminal conduct and the consequential destructive effects on a significant section of society meant that imperative grounds existed.

32. We do not accept that the judge erred in this respect. We agree with Ms Smith that a fair reading of the decision as a whole shows that the judge fully addressed the nature of the appellant's convictions and was well aware of the fact that his most recent offending related to drugs misuse. These issues were referred to repeatedly throughout the decision: see, for example, [6], [15], [64] and [66]. The judge fully took into account the judge's sentencing remarks,

quoting the material parts at [7], [64] and [67]. There is also no disagreement with the judge's directions on the law on this issue, which included the pertinent authorities: see the decision at [57]-[63].

Ground 2

33. Under this ground Mr Melvin submitted that the judge had failed to have regard to a material matter, namely whether the appellant posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

34. He argued that the judge's reliance on the NRM finding that the appellant was a victim of modern slavery in 2016 and 2017 was erroneous for several reasons: (i) it failed to take into account the fact that both the Oasys evidence and the appellant's own psychologist assessed him as presenting a continued risk of re-offending; (ii) it ignored the previous offending of the appellant and critically the fact that he had been convicted again in 2022 for a further narcotics offence, when he was not accepted to be a victim of modern slavery; (iii) the judge's approach appeared to be "going behind" the sentencing judge's findings and substituting her own view on culpability; and (iv) in any event the fact that the appellant's offending might have been caused by his underlying vulnerability was not relevant to the fundamental interests of society and the need to protect the public.

35. As to (i), we are satisfied that the judge did not overlook the Oasys evidence or Ms Davies' report. At [33] of the decision the judge specifically referred to the Oasys assessment that the appellant continued to be a medium risk of harm to children, staff in the community and custody and a high risk to the public. We note that this was an assessment from 2018. The judge clearly also considered the more up to date assessment from Ms Davies in her report. Her assessment was that the appellant formed a moderate risk of reoffending. It is clear that these reports formed part of the judge's overall assessment, but that in approaching the overall question of whether the appellant posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society, the judge also considered the trafficking context in which at least some of the offending had been committed and the nature of the offending in question.

36. As to (ii), we are satisfied that the judge gave careful consideration to the extent of the appellant's criminality overall. It was referred to repeatedly throughout the decision: see, for example, [3], [18], [33]-[34] and [66]. These passages make clear that the judge took into account the appellant's earlier criminality and was aware of his 2022 conviction and sentence.

37. His 2022 conviction and sentence were plainly a relevant matter to which the judge had to have regard. The appellant had given evidence about this at the hearing. He had said that on his release from prison in 2021 he had no support and had re-offended because he had been "asked to do something for money by someone he knew but he had not realised it was criminal". He now intended to "do all that he could to make better decisions". He had undertaken

a self-awareness course in prison. He was now in a supportive relationship and his partner was expecting their baby. She also had another child who looked on him as a father. This evidence was considered by the judge: see the decision at [16]-[18]. Accordingly while it might have been preferable if the judge had specifically addressed the submission that the most recent offending did not appear to be linked with modern slavery, we are satisfied that the judge did consider the context of this offending and the relevance it had to the overall assessment of the threat posed by the appellant.

38. As to (iii), we do not accept that the First-tier Tribunal judge did make any findings that were contrary to those of the 2019 sentencing judge. We have considered those sentencing remarks with care. They make clear at page 10F that the appellant had been recruited by a co-defendant and had offended just before his 18th birthday, but they do not make any explicit findings to the effect that he had been a victim of modern slavery. They do not refer to the NRM conclusive grounds decision, nor could they, as this post-dated the sentencing. As an aside, we were told at the outset of the appeal hearing that the appellant is now seeking permission to appeal his conviction based on the NRM decision, in light of recent appellate authority on the position where defendants plead guilty having not been properly advised of the statutory defence under section 45 of the Modern Slavery Act 2015 (R v BWM [2022] EWCA Crim 924). Overall we consider that the judge was entitled to take into account the NRM decision as part of the overall threat assessment.

39. As to (iv), it is self-evident that the interests of society can be adversely affected by criminality, whatever the underlying reasons for that criminality. That is a point most relevant to the question of whether the judge had regard to the fundamental interests of society. For the reasons explained under Ground 1 we are satisfied that the judge did so.

40. Overall Ms Smith emphasised that at no point had the appellant been sentenced to imprisonment for 4 years or more, sentences of such a level generally being more likely to make out imperative grounds for deportation. The NRM finding also provided an important context for the drugs offences leading to the 2019 conviction. It was important to remember that this was an imperative grounds case. The decision the judge reached to the effect that the respondent could not meet the high threshold of imperative grounds was one that was open to the judge. We agree with that overall assessment.

Ground 3

41. Under this ground Mr Melvin submitted that the judge had erred by taking into account immaterial matters. This was because the judge has referred at [65] of the decision to the fact that the appellant will be released into the community at the halfway point through his criminal sentence, which showed that it was recognised that he was “safe” to be so released. The respondent asserted that this was incorrect because the appellant’s release at that point was not going to be as a result of a parole board assessment, but because of his entitlement to release given the length of his sentence. It was submitted

that the judge was therefore wrong to find it was a factor relevant to the risk posed by the appellant.

42. However we agree with Ms Smith that the fact that the appellant will be released at the halfway point through his sentence was just one of the factors taken into account by the judge, who otherwise conducted a full assessment of the risk issue. Further, the "safety" of his release referred to by the judge does not necessarily refer to a parole board decision, but could simply be a reflection of the statutory framework addressing the release provisions for sentences of this length. Accordingly if there was any error in this regard it was not a material one.

Ground 4

43. Finally Mr Melvin argued that the judge had failed to make a finding on a material matter, namely the health services that the appellant could avail himself of in the Netherlands. The respondent referred to the SHHD's letter dated 16 March 2022, which had addressed this issue and argued that the judge had failed to address it.

44. Again, however, we accept Ms Smith's submissions. Although this was not referred to specifically in the proportionality assessment, the judge had earlier noted the evidence provided by the appellant to the effect that even if medical treatment would be available in the Netherlands, he would be unable to seek it out, engage with and benefit with it: see [42] of the decision. The judge referred there to the country report from Colin Carswell, paragraphs 46-63 of which addressed this issue. The judge had also been provided with evidence from Dr Galappathie to the same effect (see paragraphs 93-94 of his report). There was no error of law in this regard.

45. Accordingly we find no material errors of law in the judge's decision requiring it to be set aside and we uphold the decision.

Notice of Decision

46. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. We do not set aside the Judge's decision and the decision therefore stands.

Mrs Justice Hill

Sitting as a Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 January 2023