IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005986

First-tier Tribunal No: DA/00278/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27 September 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

Secretary of State for the Home Department

Appellant

and

Faisal Mohammed
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr A Osman, of Counsel, instructed by Turpin Miller LLP

Heard at Field House on 12 September 2023

DECISION AND REASONS

Introduction

1. The claimant is a citizen of the Netherlands born on 26th March 1996. He arrived in the UK in 2000 when he was four years old. His appeal is against the decision dated 18th August 2020 to make a deportation order under the Immigration (EEA) Regulations 2016 due to his posing a genuine, present and sufficiently serious threat to a fundamental interests of society following his conviction for possession with intent to supply class A drugs on 19th June 2019, which resulted in a sentence to three years imprisonment. His appeal was allowed under the EEA Regulations and on human rights grounds by First-tier Tribunal Judge G Clarke in a determination promulgated on the 23rd November 2022.

2. Permission to appeal was granted to the Secretary of State by Upper Tribunal Judge Macleman on 23rd January 2023 on the basis that it was arguable that the First-tier judge had erred in law in relation to the determination of the appeal under Article 8 ECHR, but permission was granted on all grounds.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material making it necessary to set aside the decision.

4. Ms Cunha applied to amend the grounds of appeal with a written application drafted on 11th September 2023 and emailed to the Upper Tribunal at 17.49 on that day. Whilst fully appreciating that Ms Cunha had personally acted as promptly as she could, as she only received the papers on 11th September 2023, the application was very late as it only reached the Judge on the morning of the hearing, and there had been an opportunity for a representative of the Secretary of State to have reviewed the papers as this matter was listed to be heard in July 2023 and had to be adjourned, and so a Home Office presenting officer will have had sight of the papers at that point and no application to amend grounds was made at that time. By putting the matter back in the list Mr Osman was in agreement that the first amended ground (making a material misdirection of law in relation to enhanced protection requiring imperative grounds of public security to deport) could be argued as he was able to deal with it and it had common ground with the original grounds of appeal. I permitted this amended ground to be argued.

5. I did not grant permission to the Secretary of State to amend the grounds to argue new grounds two and three. I noted the lateness of the proposed amendments, and the previous practical opportunity of a senior presenting officer to review the original grounds when the appeal was adjourned in July, and the overriding objective as set out in The Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases fairly and justly avoiding unnecessary delay, and found in the context of these grounds not being arguable, for reasons I briefly set out below, that it was not right to permit them to be argued. The second new ground, which I did not permit to be argued, concerned a contention that there was a failure by the First-tier Tribunal to consider the OASys report and give adequate reasons with respect of this report. However the First-tier Tribunal cites this report at paragraphs 64, 70-74, 87, and 91 of the decision. Elements of this report identified in the grounds, such as the claimant not being motivated to find work, his medium risk in the community, continued issues with drug addiction, an issue of being in a fight in prison and lack of motivation to address his offending behaviour are all considered in the decision in these paragraphs. The ground was not arguable. New ground three contended that the First-tier Tribunal had made perverse findings with respect to the claimant not being able to integrate if he returned to the Netherlands in the Article 8 ECHR assessment as one factor going to difficulties in integration was found to be that he would find it difficult to obtain

employment in the Netherlands as he speaks no Dutch, has no employment history in the UK and has a criminal record for drugs crime. It is argued in the grounds that there are international institutions in the Netherlands that work in English, and thus this finding is irrational. This is a patently unarguable point: the appellant has only functional skills (lower than GCSE) qualifications in maths and English, and a level 2 BTEC in ICT. He is 27 years old, he has no work experience and a serious criminal conviction and there is no evidence identified in the grounds that was before the First-tier Tribunal that he is likely to be able to obtain work in an international institution, and, I find, that unskilled work in the Netherlands, which the claimant might be able to find, is likely to require a working knowledge of Dutch which he does not possess.

Submissions and Conclusions – Error of Law

6. It is accepted that the Secretary of State does not challenge the finding that the appellant has permanent residence, and thus that he is entitled to the second level of protection, namely that he may only be deported on the basis of serious grounds of public policy and security. Ms Cunha would have liked to argue that allowing the appeal on this basis was not adequately reasoned but this contention was not in the original grounds or the amended ones. She attempted to argue that the finding at paragraph 97 of the decision, allowing the appeal in the alternative on the basis that the claimant's deportation was not justified on serious grounds of public policy, was flawed by reference back to the decision making on enhanced imperative grounds of public security. However the new and original grounds of appeal on this issue focused on an error by the First-tier Tribunal in failing to include an assessment of the integration of the claimant at the end of his ten year period, and in particular whether this integration had been broken by his period of criminality and imprisonment, and in the original grounds in the assessment of integration. Matters of integration clearly are not relevant to protection at the second level based on permanent residence.

7. The only part of the grounds which challenges the finding at paragraph 97 of the decision is at paragraph 7 of the original grounds where it is said as follows: "It is submitted that the seriousness of the offence and the fact that the appellant poses a medium risk of harm in certain categories justifies exclusion on serious grounds of public policy". This, I find, does not identify an error of law in the decision of the First-tier Tribunal that the claimant is entitled to succeed in his appeal on the basis of serious grounds protection. It is clearly not the law that all people who have one conviction for possession with intent to supply class A drugs will be deportable on this basis. The First-tier Tribunal was mindful of the medium risk of reoffending and the nature of his criminality as these are set out at paragraph 95 of the decision in relation to this test. It is a finding at paragraph 76 of the decision that this claimant is not a serial offender, and was of good character when

he was convicted as this was mentioned by the sentencing judge, and reliance is placed at paragraph 78 on the offender manager's assessment that the appellant posed a low risk of harm to the public; and, as set out at paragraph 63 of the decision, the view of the sentencing judge who noted in the pre-sentence report that he was unlikely to reoffend and had shown remorse. I find that there was no error of law in the First-tier Tribunal finding that the serious grounds test was not met by the Secretary of State: whilst the social evil of drugs and criminality which is associated with drugs is set out and acknowledged in the decision it was rationally open to the First-tier Tribunal to find that there were no serious grounds of public policy or security finding that the claimant posing a genuine, present and sufficiently serious threat to a fundamental interests of society.

8. As the appeal is lawfully allowed on the basis of this second level of protection any error that might exist in the imperative grounds decision is not material to the appeal being allowed. However for completeness I look at that decision in relation to the imperative grounds decision.

9. The attack on the imperative grounds decision is in essence that the First-tier Tribunal failed to consider integration at the point of the expulsion/deportation decision as well as considering the period of residence. At paragraph 55 of the decision it is found that the claimant may only be deported if there are imperative grounds, and thus that the claimant has the highest level of protection. However, it is argued that this is based on a misdirection of law as whilst he has been present for more than ten years it is argued that the finding that he is socially and culturally integrated in the UK is not made in relation to the level of protection to which the claimant is entitled, and further the decision is flawed as it fails to take into account the appellant's time in prison and the fact that since the age of 19 years the appellant has neither been in education nor work nor has contributed to society in any other way, and further that he was recalled to prison, and that he poses a medium risk to others in known persons, prison staff and inmates and that the offence is one which poses a serious risk to society and that deportation would be entirely proportionate in all of the circumstances.

10. The high nature of the imperative grounds test is set out at paragraph 68 to 69 of the decision requiring an actual and compelling risk to public security. I find that the First-tier Tribunal does however fall into an error at paragraphs 54 and 55 of the decision in finding that the claimant is entitled to imperative grounds protection prior to considering whether his criminality and imprisonment had broken his integrative links at the time of the expulsion decision. The decision was made in August 2020 and the claimant had spent over a year in prison serving his sentence for possession with intent to supply class A drugs at this point in time. However, I find that this error is not a material one as, although this conclusion appears prematurely in the decision, the First-tier Tribunal then goes on to look at his integrative links within the context of the decision under the EEA Regulations, and, I find,

ultimately does what is required, as set out by the Court of Appeal in Hussain v SSHD [2020] EWCA Civ 156 at paragraph 37 (helpfully set out in Ms Cunha's amended grounds) as it considered whether the claimant was still integrated having looked at: the links prior to his imprisonment, the nature of the offence, the circumstances of the offence and the conduct of the claimant in detention.

11. Findings on these matters are set out in the sections of the First-tier Tribunal decision entitled "assessment of threat", "The OASys report", "principles of proportionality" and "rehabilitation". It is clear from the findings in these sections that the claimant has been entirely brought up and educated since the age of 4 years in the UK, and has no ties with any other country, and has an on-going relationship with his family, including during the period he was in prison, who wish to help him, and with whom he has lived throughout when not in detention, and worked in prison serving food. His criminality was serious, but he was given the shortest sentence applicable by the Crown Court Judge. It is found that the claimant's criminal behaviour arose from a hopeless attempt to pay of a drugs debt due to his being an cannabis addict. It is found that he did at least one rehabilitative course in prison, although has shown other signs of not being motivated to address his addiction and got into one fight in prison. The conclusion that the claimant's integrative links have been maintained at paragraph 86 of the decision of the First-tier Tribunal is therefore made in the context of that Tribunal making findings on all the material evidence. I therefore find that ultimately there is no material error of law in the finding that the claimant was entitled to imperative grounds protection as there is a reasoned decision considering the material evidence finding that he had maintained his integrative links at the time of the decision to deport.

12. It is also argued in the original grounds of appeal that the First-tier Tribunal erred in law in allowing the appeal under Article 8 ECHR which was not applicable as this was an appeal under the EEA Regulations. Ms Cunha did not pursue this ground orally before me however and as Mr Osman submitted the decision of the Secretary of State was made both under the EEA Regulations and on human rights grounds so it follows that the First-tier Tribunal did not err in law in covering both of these legal grounds in the decision.

Decision:

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

14. I uphold the decision of the First-tier Tribunal allowing the appeal of the claimant under the EEA Regulations.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13th September 2023