IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005999
First-tier Tribunal No:
DA/00022/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

9th October 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ISMAIL MOHAMUD HASSAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Presenting Officer
For the Respondent: Mr D Hayes, Solicitor, D Hayes Public Law Practice

Heard at Field House on 2 October 2023

DECISION AND REASONS

Introduction

1. The parties are named as they were before the First-tier Tribunal. Mr Hassan is 'the appellant' and the Secretary of State is 'the respondent'.

2. The respondent appeals against a decision of Judge of the First-tier Tribunal Burnett ('the Judge') allowing the appellant's appeal against deportation under the Immigration (European Economic Area) Regulations 2016 by a decision sent to the parties on 30 November 2022.

Preliminary Matter

3. Permission was given for Ms Cunha to attend the hearing remotely by video link. Unfortunately, consequent to poor connectivity, Ms Cunha could not be seen or heard and so a decision was taken with the agreement of both representatives that she attend the hearing by telephone. I am satisfied that throughout the course of the hearing Ms Cunha could hear everyone in the hearing room, and that everyone in the hearing room could hear her.

Brief Facts

4. The appellant is a Dutch national and presently aged 33. He entered the United Kingdom with family members in July 1999, when aged 9. He attended both primary and secondary school in the United Kingdom.

5. He accumulated seventeen convictions for 26 offences between December 2011 and March 2021, mainly concerned with illegal drugs.

6. In respect of the index offence, he was stopped by police officers on mobile patrol in London on 16 November 2018. He was in the company of his co-defendant. Both men were searched, and the appellant informed a police officer that he had a quantity of herbal cannabis and class A drugs on his person. A plastic bag containing heroin was subsequently found in his jacket pocket. Herbal cannabis and crack cocaine was also taken from him. The police searched the home addresses of both men and £9,000 in cash was recovered from the bedroom of the co-defendant. The appellant denied any knowledge of the cash, just as his co-defendant denied any knowledge of the class A drugs the appellant was carrying on his person. During his police interview the appellant explained his involvement in drug dealing but was adamant that he was not selling class A drugs. He explained that he was simply collecting and delivering the illegal merchandise for an unnamed person. He asserted that he was not being paid for this work, nor was he making any money from selling class A drugs. He stated that in his role as a courier he was not acting under duress. He acknowledged that he was paying off a drug debt but would not say to whom the debt was owed.

7. On 17 December 2020 he was convicted at Ealing Magistrates' Court on one count of possession with intent to supply a class A drug (heroin) and one count of possessing with intention to supply a class A drug (crack cocaine). His case was transferred to Isleworth Crown Court and on 11 March 2021 he was sentenced to 28 months' imprisonment on each count, to be served concurrently.

8. In sentencing the appellant HHJ Wood remarked:

> '... The sentences as I say on each will be concurrent. ...

> ... The starting point, as I am sure you were made aware, or know, for a Class A street dealing, a significant role, and undoubtedly yours was a significant role, is four and a half years.
>
> It is aggravated by your previous convictions. You have, by my calculations, I think 11 previous convictions since 2011 for possession of cannabis. Two for possession of Class A drugs, and you have a conviction for possession with intent to supply in 2016, for which you received a suspended sentence. You have received that, you have received numerous community orders, but you have continued to offend. You breached a conditional discharge in the past, you failed to comply with community order requirements, and you breached the suspended sentence. I have no confidence at all in the sentence I pass involving the requirement conditions that you would adhere to. In my view, your previous increases the sentence by six months to one of five years.
>
> I take off the following. This is, I think is your first immediate custodial sentence. You will be separated from your son for a period of time. You will be serving it in Covid conditions. I give you credit for the efforts that you have made in terms of a job and getting off drugs since your arrest. And I also take into account the age of the offence. It is not a question of the age being such because you pleaded not guilty, you pleaded guilty at the first available opportunity, and you will get a third credit for that. But the age itself, in my view, requires a deduction. And for all of those matters and everything else that has been put forward, I shall deduct 18 months from the sentence of five years. That brings the sentence down to a sentence of three and a half years, 42 months, and I shall take a third off that. That is 14 months, so bringing a final sentence of 28 months. That is two years and four months for which you will serve a half.'

9. The respondent issued a deportation decision under the 2016 Regulations, dated 3 February 2022. She accepted at para. 32 of her decision that the appellant had resided in the United Kingdom for a continuous period of at least ten years. She further accepted at paras. 33 and 34 that the appellant had acquired a permanent right to reside in this country and that he had not lost his integrative links. Consequently, she accepted that the appellant's deportation had to be justified on imperative grounds of public security, at para. 34,

10. The respondent assessed the threat posed by the appellant and concluded:

> '60. In the absence of any evidence that you have fully and permanently overcome your drug addiction, it is believed that you are likely to revert to using drugs upon your release from prison which would, in turn, increase the risk of you re-offending and continuing to pose a risk of harm to the public, or a section of the public.
>
> ...

> 63. In the absence of evidence that there has been any improvement in your personal circumstances since your conviction, or that you have successfully addressed the issues that prompted you to offend, it is considered reasonable to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public, or a section of the public.'

11. The respondent considered that it was imperative that the appellant be deported from the United Kingdom in order to preserve the safety and security of those resident in this country. She did not consider the appellant's deportation to be disproportionate.

Decision of the First-tier Tribunal

12. The appeal came before the Judge sitting at Taylor House on 7 September 2022. The appellant and his sister gave evidence.

13. The Judge concluded as to the appellant's integrative links:

> '35. I would state though in any event that when taking all of the information into account, I would conclude that the appellant's integrative links have not been broken by his recent sentence and imprisonment. The appellant has substantial ties and links to the UK. He has been educated in the UK, obtained some employment and his immediate family members are here. The appellant maintains links with his family. This was evidenced by the numerous latter of support and the attendance of some at the hearing. I have noted above the HH gave evidence as a 'family spokesperson'. I should note that the respondent accepted that the appellant satisfied the integration criteria (see par 34 of the RFRL).
>
> 36. The respondent did not argue that the integrative links had been broken at the appeal hearing. Ms Akbar accepted that the 10 year imperative grounds test was the test which I must apply.
>
> 37. It is accepted that the appellant is entitled to the highest level of protection. He is entitled to rely upon the imperative grounds test'.

14. The Judge properly noted at [40] of his decision that the burden of proof rests upon the respondent to show that the appellant represents the necessary threat required under the 2016 Regulations.

15. Having considered relevant precedent authority, the Judge concluded:

> '61. The above case law reflects that in order to meet the required threshold the offence has to be of a particular serious nature. The appellant's sentence of imprisonment was only 28 months which is short period of time in comparison to the cases considered above. The appellant is not part of an organised gang and the appellant's offending should be considered at a much lower level than that. Even if the appellant's offends again, the type of offences he has committed might be considered to be street

> dealing of drugs, which I do not consider would constitute an offence of sufficient magnitude to meet the required threshold. Although the appellant has a poor criminal record and I believe he will offend again, I do not consider that he meets the requirements of the relevant test.
>
> 62. However the appellant would be well advised to note that the UK has now left the European union. The protections afforded to him in the past may not be available to him in the future.
>
> 63. The question I need to answer is whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In all the circumstances, I consider that the threshold set out in regulations has not been demonstrated by the respondent and I conclude that the appellant does not represents a genuine, present and sufficiently serious threat on imperative grounds of public security.
>
> 64. In my judgment it is clear that the threshold has not been reached in this case. I therefore allow the appeal.'

16. In the alternative the Judge considered proportionality. He noted the length of the appellant's residence in the United Kingdom and accepted that such links were strong and not broken by criminal offending. He observed that the appellant had been educated in the United Kingdom.

17. The Judge found that the Netherlands would be like an 'alien country' to the appellant and that it was unlikely his family would be able to provide him with any meaningful support in that country.

18. He accepted that the appellant had engaged in rehabilitation, undertaking courses and working with his probation officer.

19. The Judge concluded:

> '76. I have carefully balanced all the factors in this case and the issues raised in respect of the proportionality of the decision. I find that due to the length of residence in the UK and that the appellant's immediate family remain in the UK, I am prepared to accept that the balance is in favour of the appellant, despite his offending. I find that the decision of the respondent is a disproportionate response on the information before me. I hence allow the appeal of the appellant under the EEA Regulations.'

Grounds of Appeal

20. Ms Cunha candidly, and properly, accepted that the grounds of appeal relied upon by the respondent before this Tribunal are jumbled. They run to eleven paragraphs.

21. To aid this Tribunal Ms Cunha identified three grounds as being advanced:

(i) The First-tier Tribunal failed to adequately consider the sentencing remarks and the OASys Report, at [3] and [4] of the grounds.

(ii) The First-tier Tribunal failed to consider imperative grounds taking into account Schedule 1 factors, at [1] and [2].

(iii) The First-tier Tribunal failed to adequately assess proportionality including a failure to take into account Schedule 1 factors, at [5], [6], [7], [8] and [9].

22. Permission to appeal was granted by Upper Tribunal Judge Pickup on 17 July 2023.

23. The appellant filed a rule 24 response dated 15 August 2023.

Law

24. Regulation 27(4)(a) of the 2016 Regulations, as in force at the date of the respondent's decision, provided that an expulsion/deportation decision could not be taken except on imperative grounds of public security in respect of an EEA national who had a right of permanent residence under regulation 15 and who had resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision.

25. The Judge found, and the respondent accepts, that the appellant's integrative links were not broken by his recent custodial sentence.

26. In *Case C-145/09 Land Baden-Württemberg v. Tsakouridis* [2011] 2 CMLR 11 at [41], [43]– [44] the Grand Chamber of the CJEU confirmed the concept of imperative grounds of public security presupposes not only the existence of a threat to public security, but also that such a threat was of a particularly high degree of seriousness. Public security covers both a Member State's internal and external security and could be affected by a threat to the functioning of the institutions and essential public services and a survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful co-existence of nations, or a risk to military interests. This is a high threshold and the protection offered by imperative grounds establishes a marked difference to the less stringent test applicable to deportation of those with shorter periods of residence.

27. The Grand Chamber confirmed that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group were not necessarily excluded from the concept of public policy, at [45]-[47].

28. In respect of proportionality of any interference with fundamental rights the court held at [53] that to assess whether the interference contemplated was proportionate to the legitimate aim pursued, namely the protection of public security, account had to be taken in particular of the nature and seriousness of the offence committed, the duration of

residence of the person concerned in the host Member State, the period which had passed since the offence was committed and the conduct of the person concerned with that period, and a solidity of the social, cultural and family ties with the host Member State.

Discussion

29. Ms Cunha accepted with her usual candour that the grounds of appeal were erroneously focused upon the serious grounds test, as identified at [1] and [9], and not the imperative grounds test which the respondent accepted was applicable in this matter.

30. She further accepted that the primary challenge to the Judge's decision in respect of the imperative grounds test was to be found in [3], and possibly [4]:

> "3. It is submitted that due weight has not been given to the judge's sentencing remarks [21] or the OASY's report [22] which states that the appellant is at high risk of reoffending, given the FTTJ has also agreed that the appellant is a 'prolific offender' and does not accept that he will change his behaviour [24].
>
> 4. It is submitted that the FTTJ found that the appellant had not applied the skills learned from the rehabilitation programme and therefore the programme has had no impact in changing his behaviour nor scope for him to do so as he has not actively addressed the issues of his reoffending [43], despite the support he has received. The FTTJ has also stated that the crimes committed are serious [46]".

31. A difficulty for the respondent is that [3] fails to adequately engage with the actuarial conclusion of OASys, namely that whilst the appellant is at high risk of reoffending, the crimes he will commit are of low risk to the public. In the ranks of organised crime, he is a street-level drug dealer, and there was no evidence before the First-tier Tribunal that he occupied any other rank in the distribution of illegal drugs. It is the risk of serious harm to others that is relevant to the imperative grounds' consideration, not the likelihood of the appellant's reoffending. Ms Cunha sought to rely upon the sentencing remarks of His Honour Judge Wood, but at their core they amount to no more than confirmation that the appellant is engaged in street dealing and no more. Reference to 'significant role' relates to this activity, and not to any higher role within an organised criminal gang engaged in the illegal importation and supply of controlled drugs.

32. As to [4] the finding that the appellant has not applied skills learned from rehabilitation to address his reoffending does not by itself establish that his offending is such to establish a threat to public security of a particularly high degree of seriousness. When considering the Grand Chamber's judgment in *Tsakouridis* it is appropriate to observe that it was concerned with involvement in an organised criminal group reaching such a level of intensity through trafficking in narcotics that might directly threaten the calm of physical security of the population as a whole or a

large part of it, at [45]–[47]. The Judge's sentencing remarks and the OASys assessment go nowhere close to establishing such high degree of seriousness.

33. As to the second purported challenge to the imperative grounds conclusion reached by the Judge Ms Cunha accepted that [1] and [2] were drafted as if the test to be considered was serious grounds alone. She acknowledged that if she could not succeed on ground 1 above the respondent's challenge to the imperative grounds conclusion reached by the Judge fell away. She was right to adopt this course. In any event, ultimately the second ground identified at para. 20(ii) above amounts to no more than a disagreement with the findings made by the Judge, who clearly had Schedule 1 of the 2016 Regulations in mind, having addressed them in full at [16] of his decision.

34. Having found that the Judge's conclusion in respect of imperative grounds was lawful and properly reasoned, there is no requirement for me to consider the third ground advanced by the respondent. However, it is appropriate that I simply observe that if I had been required to consider this ground, I would have dismissed it as the challenge advanced amounts to no more than a disagreement with the Judge's conclusion as to proportionality.

35. For these reasons the respondent's appeal is dismissed.

36. I am grateful to Ms Cunha for her helpful and thoughtful submissions in circumstances where she was not greatly aided by the written grounds relied upon by the respondent.

37. It is appropriate that I record in writing the observation that I made to the appellant at the conclusion of the hearing when I informed him that the respondent's appeal was dismissed. Adopting similar observations as the Judge, at [62] of his decision, the appellant is properly to be mindful of the fact that he has succeeded in his appeal because he enjoyed the benefit of a protection offered by European Union law. Since the United Kingdom left the European Union, he no longer enjoys the protection of the 2016 Regulations and ultimately the Citizens' Directive. He should properly be aware that any further reoffending and the imposition of a lengthy custodial sentence is likely to see him subject to deportation proceedings that fall under domestic law, and so he will be without the protections that aided him in this appeal.

Decision and Reasons

38. The decision of the First-tier Tribunal sent to the parties on 30 November 2022 is not subject to material error of law.

39. The Secretary of State's appeal is dismissed.

D O'Callaghan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 October 2023