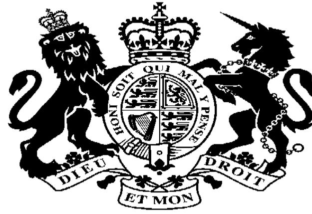

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01274/2012

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Determination Promulgated**
On 7th August 2013	**On 9th August 2013**
	………………………………

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Appellant

and

MS LAURINDA PEREIRA RAFAEL

Respondent

Representation:

For the Appellant: Miss Martin (Home Office Presenting Officer)
For the Respondent: Miss A White (instructed by Dicksons, solicitors)

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal, with permission, against a decision of the First-tier Tribunal (Judge TRP Hollingworth and Dr JO de Barros) promulgated on 14th March 2013 in which it allowed the claimant's appeal under the EEA regulations.

2. It was accepted before the First-tier Tribunal that the claimant had been in the UK in excess of 10 years prior to her conviction and thus was afforded the highest level of protection under the EEA regulations and could only be deported on imperative grounds of public Security.

3. The claimant committed a very serious offence and was sentenced on 26th November 2009 to 6 ½ years imprisonment for being knowingly concerned in the importation of a

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Class A drug. The circumstances of the offence were that the claimant was intercepted at Gatwick airport with a large cache of Class A drugs in her luggage. She did not co-operate with police with regard to others involved. That was her first offence but its gravity nevertheless led the judge to impose an immediate custodial sentence.

4. In the grounds the Secretary of State asserts that at paragraph 48 of the determination the Tribunal noted that the claimant had been assessed in a NOMS 1 form as presenting a medium risk of serious harm and a low risk of reoffending, but that an OASys report assessed her as being a low risk of both. On that basis the Secretary of State submits the Tribunal failed to come to a conclusion as to the risk. They had not reached their own conclusion which they should have done given the inconsistency

5. Secondly the grounds assert that the Tribunal failed to make any findings as to whether the claimant had addressed her drug habit, having noted that not only was she misusing drugs at the time of the offence, but had been for a number of years. The Secretary of State submits that was an important issue that would have an impact on the risk of the claimant offending in future.

6. Thirdly the Secretary of State submits that the Tribunal failed to make any findings regarding the claimant's claim in her witness statement that her GP said she would never work again. In light of this, the fact that no one attended court to offer her support, including her own daughter, the Secretary of State submits that the Tribunal failed to make essential findings about the her support network given that if released, she will return to the same area she resided before with little prospect of work.

7. The Secretary of State also referred to the Tribunal's finding that the claimant was quite willing to lie when it suits.

8. These errors, it is submitted, render the Tribunal's conclusion that there were not imperative grounds requiring her deportation flawed.

9. Miss Martin expanded on these grounds before me.

10. Miss White, on the claimant's behalf had lodged a Rule 24 reply. In particular with regard to the alleged inconsistency between the NOMS and OASys, she said that on examination there was in fact no inconsistency. The seven-page NOMS report summarises the previous OASys report of 27th May 2011 and at page 7, section 6 assesses the level of risk of serious harm to others as low; the same assessment reached in the more recent OASys report. There is therefore no inconsistency between the two documents. That, as revealed by an examination of both documents is clearly correct. Furthermore, as Miss White also pointed out, the more recent OASys report is a document running to 50 pages, dated 26th July 2012 and prepared by the National Probation Service who must be regarded as experts in their field and better qualified to assess the risk than the Tribunal. I agree. The Tribunal can and should rely on such evidence, unless it contains demonstrable errors of fact. That ground does not identify an error of law.

11. So far as the claimant's drug habit is concerned it is incorrect to say the Tribunal made no findings. It is quite clear that the Tribunal made a finding that she is drug-free. Miss Martin suggested this was not to be relied upon given that she is in prison. However, Miss Martin is as aware as the Tribunal that it is a relatively easy matter to obtain drugs in prison. If that were not recognised there would be little point in their carrying out drugs tests, which they do. The evidence is that she is drug-free. Not only is she drug free but has undertaken various courses in prison in relation to drugs. That ground does not identify an error of law.

12. Finally the Secretary of State asserts that the Tribunal although referring to Tsakourides (Case C-145/09) CJEU (Grand Chamber) did not apply it.

13. The protection afforded to an EEA national who has been in the UK for 10 years before they can be deported is a high one indeed. In LG (Italy) v SSHD EWCA Civ 190 the Court of Appeal confirmed that an EEA national who had been here for 10 years can only be deported on imperative grounds of public security, which bear a qualitative difference to the less stringent grounds applicable to deportation of those with shorter residence. Imperative connoted a very high threshold and the ground requires an actual and compelling risk to public security, though public security need not be equated to national security. The Court of Appeal said that "risk to the safety of the public or a section of the public" seemed reasonably consistent with the ordinary meaning of the test. The Court of Appeal seemed to be of the opinion that the severity of the offence committed was not necessarily one to make removal "imperative". In VP (Italy) v SSHD 2010 EWCA Civ 806 the Court of Appeal endorsed LG (Italy) and said that imperative grounds of public security required not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years residence in the host state. The severity of the offence could be a starting point for consideration but there had to be something more to justify a conclusion that removal was imperative to the interests of public security. So the appellant, an Italian who had been here since 1986 and had served 9 years for attempting to murder his ex wife, including twice trying to cut her throat and inflicting 32 knife wounds, could not be removed when there was a low risk of reoffending albeit a medium risk of serious harm to others.

14. In Tsakourides the claimant had an extensive criminal record, including eight counts of illegal dealing in substantial quantities of narcotics as part of an organised group and had been sentenced to six and a half years' imprisonment. The Grand Chamber held that a crime in connection with dealing in narcotics as part of an organised group was capable of being covered by the concept of 'imperative grounds of public security' within the meaning of Article 28(3). Drug trafficking represented a serious evil for the individual and society and could reach a level of intensity that might directly threaten the physical security of the population. However, an expulsion measure under Article 28(3) had to be based on an individual examination of the specific case. Such a decision could only be justified if, having regard to the exceptional seriousness of the

threat, such a measure was necessary for the protection of the interests it aimed to secure, provided that that objective could not be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who had become genuinely integrated into the host Member State (para 49). Furthermore, a balance had to be struck between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned by reference to the penalties/sentences imposed and the degree of involvement in the criminal offending against the risk of compromising the social rehabilitation of the Union citizen in the State which he had become genuinely integrated. In PI v Oberburgermeisterin der Stadt Remscheid (Case C-348/090 CJEU (Grand Chamber) it was said that European jurisprudence had established that the fight against crime in connection with dealing in narcotics as part of an organised group was capable of being covered by the concept of "imperative grounds of public security" under Article 28(3). That concept presupposed not only the existence of a threat to public security, but also that such a threat was of a particularly high degree of seriousness, as reflected by the use of the words "imperative grounds" (para 15).

15. There was no evidence before the First-tier Tribunal that the claimant was part of an organised group. Clearly she was not acting alone; she was a mule. She was clearly acting under the instruction of probably an organised group. However there is no evidence to indicate that she was part of the organisation. The Tribunal was clearly mindful of the high threshold for imperative grounds. The Tribunal referred to the case of FV (Italy) [2012] EWCA Civ 1199 which subsumed into its decision the authority of Tsakourides. The Tribunal correctly directed itself to case law. It, clearly with great reluctance, found that the claimant's offence, though serious, was not one as to justify her removal on imperative grounds of public security. The Tribunal considered the likelihood of reoffending and was entitled to conclude on the basis of the evidence before it that the risk of reoffending was low. If the risk of reoffending is low it cannot be said to that the claimant represents such a threat to the United Kingdom that she must be deported on imperative grounds of public security.

16. The determination of the First-tier Tribunal, representing as it does, a careful consideration of all of the evidence and applying appropriate case law contains no error of law and accordingly stands.

17. The appeal to the Upper Tribunal is dismissed

Signed Dated 8th August 2013

C J Martin
Judge of the Upper Tribunal