Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00012/2019**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reason Promulgated**
On 04 November 2019	**On 06 November 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VALTER KOZI

Respondent

Representation:

For the appellant: Mr P. Singh, Senior Home Office Presenting Officer
For the respondent: Mr E. Fripp, instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant (Valter Kozi) appealed the respondent's decision dated 12 November 2018 to remove him on public policy grounds with reference to The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") following his conviction for possession with intent to supply a Class A drug for which he was sentenced to six years' imprisonment.

3. First-tier Tribunal Judge Gurung-Thapa ("the judge") dismissed the appeal in a decision promulgated on 28 August 2019. She noted the appellant's immigration history, the serious nature of the criminal offence and then summarised the case put forward by both parties [2-25]. The judge directed herself to the correct legal framework applicable to the appeal [28-33]. She noted that the respondent accepted that the appellant had acquired a right of permanent residence. As such, the appellant could only be removed on serious grounds of public policy and public security. She began her assessment by considering the what weight should be given to the offence. She referred to Schedule 1 of the EEA Regulations 2016 and had regard to the serious nature of the offence [34].

4. The judge went on to consider whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society with reference to the evidence. She noted that the OASys assessment from February 2017 was not a full assessment. The risk of harm to the public was assessed as 'medium'. The report stated that this meant that the offender had potential to cause serious harm but was unlikely to do so unless there is a change in circumstances such as a return to previous lifestyle of drug dealing. She took into account the fact that the appellant had been assessed as 'low' risk of reconviction [35].

5. The judge also considered a letter from the HM Prison & Probation Service from January 2018, which stated that the appellant was not thought to require a full OASys assessment. The letter went on to say: "This is positive news and this letter is confirmation that you have been assessed as posing a low risk of harm to all sectors of the community. A review has been completed by the Offender Management Unit to confirm your low risk and this requires no intervention with an Offender Supervisor from the OMU. Due to the low risk you pose to the community you do not require a sentence plan and therefore will have no objectives to complete." [36].

6. The judge then considered the expert evidence of a Consultant Forensic Psychologist dated June 2019, whose assessment supported the probation assessment [37]. The Consultant Forensic Psychologist noted that there was no evidence to support the respondent's assertion that the appellant's offending was linked to drug use. There was no record to show that the appellant was addicted to drugs or that his offence was linked to him using drugs. The motivation for the offence was for financial gain during a period when he was out of work due to ill-health [38].

7. The First-tier Tribunal then his prison record and other evidence to explain why the appellant would not have been offered rehabilitation programmes given the low risk assessment [39-40]. She also considered the appellant's evidence [41-47]. Having considered the evidence in the round she accepted that this was the appellant's first conviction and that he had learned from it. He was aware of the impact of his behaviour and was motivated not to reoffend. She took into account the fact that he continues to see his family on a regular basis [48]. She concluded that

there was insufficient evidence to show that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that his removal could not be justified on serious grounds of public policy [49-50].

8. The respondent's grounds of appeal make general submissions, and are not clearly particularised, but the following three points can be discerned.

   (i) The judge failed to give sufficient weight to the length of the sentence. The respondent asserts that the appellant did not take responsibility for the offence and there was no evidence of remorse.

   (ii) The appellant was assessed to pose a medium risk of causing serious harm to the public. The judge failed to consider the fact that past conduct is a "key assessment and carries weight to future risk". The judge failed to give adequate reasons to explain why the risk of reoffending was low and failed to consider the seriousness of the consequences of reoffending: *Kamki v SSHD* [2017] EWCA Civ 1715 referred.

   (iii) The appellant's immigration history, including the use of false documents and absconding were also "indicative of adverse conduct" which was relevant to the assessment of whether the appellant posed a genuine, present and sufficiently serious threat. The judge erred in only considering criminal convictions.

Decision and reasons

9. The grounds have no merit and fail to disclose any errors of law that would have made any material difference to the outcome of the appeal.

10. With reference to the first point, the judge clearly considered the length of the sentence and made specific reference to Schedule 1 of the EEA Regulations 2016 [34]. The key assessment under European law was whether, at the date of the hearing, the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Article 27(3) of the Citizens Directive makes clear that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

11. In so far as paragraph 3 of Schedule 1 of the EEA Regulations 2016 purports to make a general assertion that the longer the sentence the greater is the likelihood that the person represents a genuine, present and sufficiently serious threat, the statement outlines Secretary of State's position. A judge is required to have regard to this statement, but as a general principle, it is not determinative of the individual assessment of risk that the judge was required to undertake. The length of the sentence and any previous history of criminal convictions might be relevant to that assessment, but the focus of the assessment under

European law is on the facts and evidence relating to the individual concerned.

12. The judge considered the length of the sentence and recognised that it was a serious offence. However, she was obliged to consider the professional risk assessments relating to this particular case. Mr Singh struggled to point to any evidence to support the assertion made at paragraph 27 of the decision letter that the OASys assessment concluded that the appellant "posed a medium risk of serious harm to the public". The information contained in the truncated OASys assessment does not appear to make any such statement. Mr Singh referred to copy of email correspondence dated 01 November 2018 between a case owner at the Criminal Casework Team and an Offender Manager at the National Probation Service (NPS), which stated:

> "There is only a basis OASys assessment which is the responsibility of HMPS to complete whilst he is in custody. Given the offence of Possession of class A [drug] with intent to supply his risk of harm to the public would be considered at a medium level – there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances such as a return to previous lifestyle of drug dealing. He has also been assessed at a low risk of re-conviction."

13. By the time the judge heard the appeal the NPS risk assessment had changed. The judge was required to consider the most recent evidence relating to the risk the appellant was likely to represent. At the date of the hearing, the judge considered evidence from the NPS which showed that, despite the length of the sentence, the appellant now represented a 'low' risk of serious harm and a 'low' risk of reoffending. The assessment was supported by the expert evidence of Lisa Davies, a Consultant Forensic Psychologist. The Secretary of State's reliance on an earlier risk assessment is inaccurate and unsustainable. It is not arguable that the judge erred in considering the most recent evidence, which showed a reduction in the risk of serious harm to 'low'. It matters not that the consequences of a similar offence would, in general terms, be serious if the appellant had been assessed as only representing a 'low' risk of serious harm or of reconviction.

14. The third point is equally weak. The issue of the appellant's past illegal entry into the UK using a false document was not raised as a reason that might be relevant to the assessment of current risk in the decision letter. Nor is there any evidence to suggest that it was argued at the hearing before the First-tier Tribunal. At the hearing, Mr Singh sought to expand this point to include an argument that the judge failed to take into account the previous findings of the First-tier Tribunal in 2017 with reference to the *Devaseelan* principles. The point has no merit. First, it is distinct from the general assertion made in the grounds and should have been particularised if the Secretary of State intended to rely on it. No application was made to amend the grounds and permission has not been granted to argue it. Second, the First-tier Tribunal in 2017 did not have the benefit of the professional risk assessments that were available

to the First-tier Tribunal in 2019. It would have been open to the judge to make the findings she did regardless of the findings made in 2017.

15. Past conduct might inform an assessment of likely future conduct. However, this case involved a single albeit very serious conviction. The sentencing judge noted that this was the appellant's first conviction. There was no evidence to suggest a pattern of convictions for similar offences. The OASys report made clear that the offence was financially motivated. There was no evidence to suggest that it was motivated by an addiction to drugs as claimed in the decision letter. Removal can only be justified under European law if the person represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. It is understandable that the Secretary of State disagrees with the decision, but the judge's findings were unarguable open to her on the evidence given the professional risk assessments of the probation service and the consultant forensic psychologist.

16. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DIRECTION

17. At the hearing, Mr Fripp indicated that he wanted to apply for an order for costs based on the unreasonable behaviour of the Secretary of State in bringing this appeal. As indicated by my preliminary view given at the hearing (subject to more detailed argument), the appellant might want to consider the additional costs of making such an application, the fact that permission was granted to argue the case and the difference between weak grounds of appeal and unreasonable conduct. If the appellant still wishes to make an application, it must be done in writing and on notice to the Secretary of State.

    (i) If the appellant still wishes to make an application for costs it should be served in writing within **seven days** of the date this decision is sent.

    (ii) If the appellant makes an application for costs, the Secretary of State shall serve a reply within **seven days** of the date the application is made.

    (iii) The Upper Tribunal will determine any application on the papers thereafter.

DECISION

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

The decision shall stand

Signed  Date 04 November 2019
Upper Tribunal Judge Canavan