IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005636
First-tier Tribunal No:
DA/00012/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 October 2024

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE RUDDICK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIKOLAJ PORAZEWSKI

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Presenting Officer
For the Respondent: Mr A. Slatter, instructed by TMC Solicitors

Heard at Field House on 17 October 2024

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge Corrin ('the Judge') allowing Mr Porazewski's appeal against the Secretary of State's decision of 18 December 2020 to make a deportation order against him.

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Mr Porazewski as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. The appellant is a citizen of Poland, born in Poland in 1998. He arrived in the UK in 2008 and has remained here ever since.

4. On 16 November 2018, the appellant was convicted of three counts of conspiracy to supply class A drugs, one count of wounding and one count of possessing a bladed article (a Stanley knife). He was sentenced to 54 months' imprisonment on the conspiracy counts, 18 months in relation to the wounding and 12 months for possessing a bladed article, to run concurrently.

5. On 18 July 2019 the respondent served a notice of liability to deportation, on 18 December 2020, she made a decision to make a deportation order, and that order was made on 22 December 2020.

6. The appellant appealed, and his appeal was determined by a First-tier Tribunal judge. However, in a decision promulgated on 28 November 2022, the Upper Tribunal set aside the determination and remitted the appeal to the First-tier Tribunal. The respondent conceded before the Upper Tribunal that the appellant was entitled to the protection of Regulation 27(4)(a) Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations'), such that a decision to deport the appellant could only be taken on "imperative grounds of public security".

7. The remitted appeal came before First-tier Tribunal Judge Corrin at Taylor House on 11 April 2023. In a decision promulgated on 19 April 2023, the Judge allowed the appeal.

8. The respondent applied for permission to appeal, and in a decision dated 17 May 2023, permission was granted. The appellant filed a Rule 24 response.

9. The matter then came before us. We heard submissions from both representatives, which we address where relevant below. We reserved our decision.

The respondent's grounds of appeal

10. The respondent appeals on two grounds:

    (i) GROUND ONE: The Judge made a misdirection of law on a material matter in that she treated the Upper Tribunal case of LG and CC (EEA Regs: residence, imprisonment, removal) Italy [2009] UKAIT 00024 as requiring an imperative grounds decision to be based on a custodial sentence of at least five years. In addition, "[t]he FTTJ also failed to refer to Schedule 1 of the EEA Regulations 2016 and [*t*]*he fundamental interests of society*, which expressly refers to offences related to the misuse of drugs."

    (ii) GROUND TWO: The Judge failed to give adequate reasons for finding that the imperative grounds test was not met. Specifically, the judge:

failed to refer to the case of Tsakouridis (European citizenship) [2010] EUECJ C-145/09, which had recognised that dealing in narcotics as part of an organised group could be the basis of a decision on imperative grounds; failed to "consider adequately" the seriousness of the appellant's offences; did not conduct a "proper assessment of the public interest in the Appellant's deportation"; and placed "unwarranted weight" on the appellant's lack of reoffending, given the findings of the National Probation Service that he presented a medium risk of non-violent reoffending and a medium risk of serous harm to the public.

Discussion

11. In deciding whether the Judge's decision involved the making of a material error of law, we have reminded ourselves of the principles set out in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 [26] and Volpi & Anor v Volpi [2022] EWCA Civ 464 [2-4]. We also remind ourselves of the danger of "island-hopping", rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

Ground One

12. The focus of Ground One is that the Judge misunderstood LG as establishing that a minimum sentence of five years was a prerequisite for an imperative grounds decision. The respondent points to the language the judge used at [29-30] as evidence of this:

> "29. The sentence for the drugs conspiracy falls just below the indicated starting point of 5 years in LG. The sentences for the wounding and possession of a bladed article fall far below this starting point. [….]
>
> "30. I find that the specific offending in the appellant's case does not reach the 5 year threshold. "
>
> [our emphasis]

13. Mr Slatter submitted that even if the Judge had treated LG as having established a five-year sentence threshold, she would not have erred in doing so. Mr Melvin, in turn, relied on the respondent's grounds for the proposition that the reference in LG to a five-year minimum sentence was to the respondent's guidance at the time, not to a threshold established by EU law, and the respondent's guidance had since changed.

14. We agree with Mr Melvin that the Upper Tribunal's reference to a "sentence of five years or more" in LG at [107] is taken from the respondent's guidance. Moreover, the Upper Tribunal did not endorse that guidance, but instead set out an interpretation of the EEA Regulations that was based on its own understanding of EU law, albeit taking into account

the respondent's views. [102] In doing so, the Upper Tribunal emphasised that neither the length of sentence nor the severity of the offence was sufficient to justify removal on "imperative grounds". There had to be "something more, in scale or kind to justify the conclusion that the individual poses 'a particularly serious risk to the safety of the public of a section of the public'" [110]. But the lack of a threshold operated both ways. Just as a sentence above a certain threshold could not, taken alone, justify an imperative grounds decision, nor could a sentence below a certain threshold preclude one. The focus must remain on the threat posed by the individual. Thus, at [111] the Upper Tribunal described the approach taken by Finland as "consistent with our approach" because "the criminal conviction is not sufficient in itself", notwithstanding that the minimum sentence for an imperative grounds consideration in Finland was only one year [99].

15. For these reasons, we consider that the Judge did misdirect herself by describing LG as having established a five-year "threshold", and comparing the appellant's sentences to that threshold at [29-30]. However, in order to assess whether this error was material, we must consider the content, structure and reasoning of the determination as a whole, rather than focussing on this single word.

16. The section of the decision entitled "discussion and findings" starts with a consideration of the appellant's offending at [20-21]. This begins not with the length of the appellant's sentence, but with the fact that he had been "part of an organised criminal gang involved in the trafficking of drugs". The Judge then goes on to set out a long list of factors she considers relevant. This includes that he had received a custodial sentence of four years and six months on the "most serious offence, conspiracy to supply Class A drugs," but this is not treated as determinative. Instead, it is the starting point for setting out all of the factors weighing for and against the appellant that the sentencing judge had identified in his remarks: the significance of the appellant's role in the conspiracy; his motivation; his degree of knowledge about the scale of the operation; his young age at the time of the offences; the degree to which he may have been dependent on and directed by one of his co-defendants; his lack of previous convictions; and that he was "impressionable".

17. Consistent with an emphasis on the facts of the offending, rather than the sentence imposed, the Judge then set out the details of the appellant's two other offences at [22], in spite of the relatively short sentences they had attracted: "Following an altercation with 15 year old male in McDonalds, he slashed the teenager's leg multiple times with a stanley knife. The Judge was satisfied he had carried the bladed article with him as a weapon and not with any legitimate purpose."

18. The was followed by a consideration of the appellant's post-release conduct, with reference to the views of his probation officer at [23] and [26], his initial OASys assessment and its revision in April 2022 at [24] and

[26], and his lack of further convictions and compliance with the terms of his supervision at [26].

19. At [25] and [27], the judge set out the appellant's own evidence about his abstinence from drugs and about how various aspects of his behaviour, associations, personal life and motivations had changed since the time of the offences. At several points, she noted where this evidence was corroborated by external evidence, including by the results of a random drug test [25], probation reports [27-28] and references from prison officers [27-28]. She concluded:

> "I found him to be a credible witness who demonstrated remorse and awareness of the seriousness of his offending. He has made a determined effort to rehabilitate and demonstrated insight and an understanding of preventative coping strategies."[28]

20. At [29] and [30], the Judge applied the law to her findings and set out the reasons for her conclusion that the imperative grounds threshold was not met. As noted above at [12] of this decision, each paragraph began with a reference to the five-year "threshold" or "starting point" purportedly derived from LG. Consistently with LG, the Judge went on at [29] to take into account a number of other considerations. These included that drug trafficking "poses a serious risk to the public", but also that the seriousness of the appellant's personal conduct was "at the lower end of the scale" (repeating various factors identified in the judge's sentencing remarks), and the appellant's "commendable efforts to pursue his own rehabilitation", his maturity and his lack of reoffending. The Judge concluded, "[a]ll of the evidence points to an ever-reducing risk which is being safely managed in the community" [30].

21. We consider that the Judge did not treat a five-year sentence as a minimum "threshold" that needed to be crossed. The use of the word "threshold" is unfortunate but if she had treated this as an absolute threshold, there would have been no need for her detailed consideration of so many other factors. Further, if she had thought that it was a threshold then the fact that the appellant was sentenced to a lesser sentence would have been determinative of the outcome. However, she did treat it as a "starting point"; it was, literally, the point at which she started her final assessment. This may have led her to place less weight on the offending than she otherwise would have done.

22. However, we consider that given the strength of her finding about the extent of the appellant's rehabilitation, the Judge could not have found that the imperative grounds threshold was met even if she had not treated the lack of a five-year sentence as significant. In other words, any error would not have altered the conclusion. In P. I. v Oberburgermeisterin der Stadt Remscheid (Freedom of movement for persons) [2012] EUECJ C-348/09, the CJEU considered an "imperative grounds" decision taken against a man who had been sentenced to over seven years in prison for serious sexual offences against a child. It held that "[t]he issue of any expulsion measure is conditional on the requirement that the personal

conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future." The Judge properly assessed whether the personal conduct of this appellant, on the level of grounds which applied, posed a genuine, present and sufficiently serious threat to public security at the date of her decision. Given her positive findings on rehabilitation, the conclusion would have been the same, even if he had been given a longer sentence.

23. For these reasons, we consider that the error with regard to the five-year "starting point" was not material.

24. The second way in which the Judge is said to have misdirected herself can be dealt with much more briefly. There is no requirement, either in Appendix 1 of the EEA Regulations or anywhere else, that a Judge make specific reference to the definitions it contains. Nor would it conceivably have made any difference to the Judge's decision had she done so. The words that the Respondent criticises the Judge for not referring to are taken from a list of "the fundamental interests of society". "Tackling offences likely to cause harm to society" appears in the list, and "offences related to the misuse of drugs" is given as an example of such an offence. This is entirely uncontentious. The Judge clearly accepted that offences relating to drugs were capable of posing a sufficient threat to society, and the respondent does not point to any aspect of the Judge's decision that suggests otherwise.

25. For these reasons, Ground One is not made out.

Ground Two

26. Ground Two also has two prongs. The first is a challenge to the adequacy of the Judge's consideration of whether the appellant's level of offending "was capable of reaching the 'imperative grounds' threshold." The respondent does not particularise where the Judge specifically erred, except in failing to cite Tsakouridis or at least the principle that dealing in narcotics as part of an organised group could justify an imperative grounds decision.

27. This aspect of Ground Two is not made out. As we have pointed out above, nothing in the Judge's decision suggests that she considered that the offence of trafficking in drugs as part of an organised criminal gang could not be the basis for an imperative grounds decision. There can be no error in a failure to refer to a case which makes the point that it could be. The Judge began her assessment by noting that the appellant had been "part of an organised criminal gang involved in the trafficking of drugs" [20], while at [29] she observed that "an offence of drug trafficking poses a serious risk to the public" and, more generally, that "the offences the appellant was convicted of were serious".

28. More generally, the assertion that "the FTTJ failed to consider adequately whether" the appellant's offending "was capable of reaching the 'imperative grounds' threshold" is misconceived. The point of LG is that whether the imperative grounds threshold is met cannot be determined by reference to the offending alone, but must be determined by a range of factors, including the threat posed by the individual at the date of the decision, their length of residence, their ties to their country of nationality, and so on (see, e.g., LG at [115-118]).

29. Nor has the respondent particularised how or why the Judge's assessment of the seriousness of the appellant's offending, as summarised above at [16-17] of this decision, was "inadequate".

30. The second prong of Ground Two is not made out. The respondent asserts that the Judge's conclusion as to the appellant's ongoing risk to the public was not reasonably open to her, because it placed "unwarranted weight" on the appellant's "neutral behaviour" since his release, concluded on the basis of a single negative drug test that he was abstinent from drugs (implicitly, a submission that the finding was irrational given the limited evidence) and gave inadequate weight to the OASys assessments. This ground misrepresents the Judge's assessment, which considered a wide range of evidence, concisely but in detail, including, crucially, the appellant's own oral evidence, which she found credible. The Judge's conclusion on the risk the appellant posed to the public was one that was reasonably open to her on the evidence.

31. For these reasons, we consider that Ground Two amounts to nothing more than a disagreement with the Judge's conclusions.

Notice of Decision

32. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The respondent's appeal is dismissed and Judge Corrin's decision to allow the appellant's appeal stands.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024